<u>FIA L&C</u>

Comms Surveillance: What You Don't Know Can Hurt You

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Ari Nakkab, Senior Managing Director/Global Chief Compliance Officer, Cantor
Mychal Cocke, CCO, RBC
Liz Davis, Partner, Davis Wright Tremaine
Jeanette Dexter, Director, Markets Regulatory Compliance, HSBC
Thane Twiggs, Derivatives Commodities Lead, Swap Dealer Chief Compliance Officer, Cargill
Doug Yatter, Partner and Global Vice Chair of White Collar Defense & Investigations Practice, Latham Watkins

Trends from CFTC Recordkeeping Enforcement Cases

Over the last several years, the CFTC's Division of Enforcement ("Division") has pursued a range of enforcement actions against firms for recordkeeping violations under the Commodity Exchange Act ("CEA") and the CFTC's Regulations. This paper discusses the trends from those enforcement actions, how these trends may continue to evolve going forward in the current Administration, and how firms should proactively take steps to ensure that they do not become a subject of an enforcement action.

Recordkeeping Cases

Prior to the current Administration, the CFTC brought cases against dozens of financial firms including swap dealers, futures commission merchants, and introducing brokers for failing to comply with the CFTC's recordkeeping requirements, producing staggering penalties and onerous remedial undertakings. In these cases, firms were penalized for failing to maintain, preserve, or produce records required to be kept and failing to diligently supervise matters related to their businesses as CFTC registrants. The Division found that these firms failed to stop their respective employees, including those at senior levels, from communicating both internally and externally using unapproved communication methods, including off-channel messages sent by personal text, WhatsApp, or Signal. The firms were required to keep certain of these written communications because those communications related to the firms' business as CFTC registrants but were not maintained and preserved and could not be provided to the CFTC upon request.

In September 2025, as part of an enforcement "sprint" to resolve pending matters, the CFTC under Acting Chairman Caroline Pham announced three more such actions, though with less onerous sanctions.

CFTC Regulation 1.31(b)(4) requires that registrants keep all books and records that are required to be maintained under the CEA and the CFTC's Regulations in such manner as to make them "readily accessible" for a period of two years for paper records and for the duration of the retention period for electronic records. Pursuant to CFTC Regulation 1.31(d), all of these documents are required to be "promptly" produced upon request of the Commission. For swap dealers, records required to be kept pursuant to Part 23 of the CFTC's Regulations are to be kept in accordance with Regulation 1.31. *See* 17 C.F.R. § 23.203(b)(1). Section 4s(f)(1)(C) of the CEA requires swap dealers to keep books and records of all activities related to its business as a swap dealer, in such form and manner and for such period as prescribed by the CFTC and open to CFTC inspection and examination. CFTC Regulation 23.201(a) requires a swap dealer to keep full, complete, and systematic records, together with all pertinent data and memoranda, of its swaps activities, including records of each transaction, including all documents on which transaction information is originally recorded. CFTC Regulation 23.202 also requires every swap dealer to keep daily trading records of all swaps and related cash and forward transactions it executes including, specifically, a record of oral and written communications provided or received concerning quotes, solicitations, bids, offers, instructions, trading, and prices that led to the execution of a swap transaction or the conclusion of a related cash or forward transaction.

Supervision is frequently included among the violations in recordkeeping cases. Section 4s(h)(1)(B) of the CEA requires diligent supervision of the business of the swap dealer. CFTC

Regulation 23.602 requires each swap dealer to establish and maintain a system to supervise, and to diligently supervise, all activities relating to its business performed by its partners, members, officers, employees, and agents (or persons occupying a similar function). Under CFTC Regulation 23.602, a violation can be found if the registrant's supervisory system was inadequate or if the registrant failed to perform its supervisory duties diligently.

In cases against swap dealers,[1] the Division has found that written communications were not maintained and preserved, and that widespread use of unauthorized communication methods by employees, including senior management, to conduct swap dealer business violated the firms' own policies and procedures prohibiting such communications. Firms were found to have failed to maintain adequate internal controls with respect to the use of unapproved communication methods for business-related communications. Although messages sent through firm-approved communication methods were monitored, subject to review, and, when appropriate, archived, messages sent using unapproved communication methods—including personal text messages—were generally not monitored, subject to review, or archived. As a result of the failure to ensure that employees complied with the firm's communications policies and procedures, firms were found to have failed to maintain many business-related communications, including communications in connection with their commodities and swaps businesses, and therefore to have failed to supervise diligently their business as a Commission registrant. These failures were found to be widespread across the respective firms and involved employees at all levels of authority. In some cases, certain supervisors responsible for implementing the swap dealer's policies and procedures themselves failed to comply with firm policies by communicating using unapproved methods on personal devices about the firm's Commission-regulated business.

Swap dealers were also cited for deficiencies arising from failures by their third-party vendors.[2] In those instances, registered swap dealers allowed personnel to use third-party electronic messaging platforms but lacked sufficient oversight of their electronic communications surveillance systems, despite having some general monitoring of their surveillance systems. Firms were cited for failing to put in place additional supervision or internal monitoring aimed at ensuring that the manual process was conducted and detecting if it was not.

Swap dealers were not alone in facing recordkeeping cases by the Division. Cases charging similar violations were also brought against futures commission merchants and introducing brokers. For example, the Division cited a futures commission merchant for failing to make or keep approximately 3,000 audio recordings of its associated persons' calls with customers in violation of Section 4g(a) of the CEA.[3] Section 4g(a) requires every registered futures commission merchant, introducing broker, floor broker, or floor trader to make reports regarding the transactions and positions of customers, and to keep such books and records in such form and manner as required by the Commission. In this type of matter, the Division found that the calls of the firm's associated persons would have included communications concerning quotes, solicitations, bids, offers, instructions, trading, or prices leading to transactions in commodity

[1] *See, e.g., In re Truist Bank*, CFTC Dkt. No. 24-10 (Aug. 13, 2024); *In re The Toronto Dominion Bank*, CFTC Dkt. No. 24-12 (Aug. 13, 2024); *In re U.S. Bank N.A.*, CFTC Dkt. No. 24-03 (Mar. 19, 2024); *In re Canadian Imperial Bank of Commerce,* CFTC Dkt. No. 24-28 (Sep. 24. 2024).
[2] *In re The Toronto Dominion Bank*, CFTC Dkt. No. 24-13 (Aug. 13, 2024).
[3] *In re CHS Hedging, LLC*, CFTC Dkt. No. 24-32 (Sep. 26, 2024).

interests. As a registered futures commission merchant, the firm was required to make and keep these recordings for a period of not less than a year and had failed to make or keep those records.

Similarly, the CFTC found that an introducing broker and its employees, including those at senior levels, communicated both internally and externally using unapproved methods, including via personal text messages and WhatsApp messages. The CFTC found that communications via unapproved methods were not maintained and preserved and the firm would not have been able to furnish the communications promptly to the CFTC.[4] The Division found that the firm violated its own policies and procedures prohibiting such communications, did not maintain adequate internal controls, failed to supervise diligently, and failed to implement an adequate supervisory system to ensure compliance with Commission recordkeeping requirements. The firm was also found to have violated Section 4g of the CEA and CFTC Regulation 1.35 for failing to keep required records and failing to keep records in a required manner.

While adopting a less punitive tone and imposing less severe penalties, the current Administration has brought similar cases. Three sets of firms, including swap dealers, a futures commission merchant, and an introducing broker, agreed to pay a total of $500,000 each for multi-year violations of recordkeeping and supervision rules resulting from employees' use of unapproved communication channels, such as messaging apps and personal text messages. The CFTC stated that each firm received a reduced fine for exemplary cooperation.[5]

Sources of Investigations

The Division's past recordkeeping and reporting cases were subject to criticism by Acting Chairman Pham for mining NFA examinations and SEF examinations to bring cases. While preliminary inquiries and investigations by the Division can be commenced in a number of ways, ranging from whistleblower complaints to referrals from other agencies and the exchanges, in the recordkeeping and reporting arena, some of the Division's cases were self-reported by the firm itself[6] or came out of an investigation by the Division into another matter.[7] Acting Chairman Pham was troubled that many of those enforcement actions had mined NFA examination reports to penalize registrants with hefty penalties for operational or technical issues that had not resulted in any misconduct, customer harm, or financial losses.[8] A new advisory issued in April 2025 narrowed the circumstances in which referrals from the other operating divisions should be made to the Division.[9] The new guidance, though not binding or enforceable by market participants, emphasized that the types of issues appropriate for referral to the Division would be material violations that involve willful misconduct or abuse; harm to clients, counterparties, or customers; or significant financial losses. Nonetheless, even with the 2025 advisory in place, the

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[4] *In re Oppenheimer & Co. Inc.*, CFTC Dkt. No. 24-04 (Mar. 19, 2024).
[5] *In re SMBC Capital Markets, Inc.*, CFC Dkt. No. 25-03 (Sept. 4, 2025); *In re Banco Santander, S.A., et al.*, CFTC Dkt. No. 25-04 (Sept. 4, 2025); *In re The Bank of New York Mellon, et al.*, CFTC Dkt. No. 25-01 (Sept. 4, 2025).
[6] *In re Truist Bank*, CFTC Dkt. No. 24-10 (Aug. 13, 2024).
[7] *In re The Toronto Dominion Bank*, CFTC Dkt. No. 24-12 (Aug. 13, 2024).
[8] Statement of Commissioner Caroline D. Pham on Swap Data Reporting Settlement Order and the Examination Process (CFTC Oct. 1, 2024), available at: https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement100124.
[9] Staff Advisory on Materiality or Other Criteria That Operating Divisions Will Use to Determine Referrals to the Division of Enforcement, CFTC Letter No. 25-13 (Apr. 17, 2025).

Division of Enforcement may pursue investigations based on information from a wide range of sources.

Penalties and Undertakings

Among the trends in the Division's recordkeeping cases over the last several years has been the staggering amount of civil monetary penalties imposed prior to the current Administration. The Division's 2024 Enforcement Results commented that, since December 2021, the CFTC had imposed more than $1.23 billion in civil monetary penalties against 28 financial institutions for their use of unapproved methods of communication in violation of CFTC recordkeeping and supervision requirements.[10] In addition to steep penalties, the settlements also required onerous remedial undertakings requiring a comprehensive review and assessment of supervision, compliance, training, and policies and procedures relating to electronic communications, including those on personal devices. The CFTC also imposed compliance consultants and monitors as part of the undertakings required by the settlements, which included comprehensive reviews of the firm's policies and procedures, training, surveillance program measures, technological solutions, assessment of measures to prevent unauthorized communications, and written reports for at least one year. As noted, however, the trend of steep penalties and remedial undertakings decreased under the new Administration.

The updated enforcement advisory on self-reporting and cooperation and other pronouncements in 2025 heralded an end to the aggressive examination-by-enforcement approach of prior years. While the updated self-reporting and cooperation advisory still contemplates the use of compliance monitors or consultants to ensure the completion of any remedial undertakings as called for by prior advisories, the advisory notably changed the determination of the appropriate remediation plan and the need for a compliance consultant or monitor to be made by the relevant operating division, as opposed to the Division.

Steps to Take Now

Despite the apparent shift from the Division to the operating divisions to remediate recordkeeping violations, the remedial efforts described in the CFTC's prior settlements provide examples and guidance that firms can proactively undertake now to facilitate any such efforts with the operating divisions. These efforts may include implementing new and enhancing existing policies and procedures that address electronic communications (including those found on personal electronic devices) and the preservation thereof. Processes can be implemented and enhanced to detect unauthorized communication methods for business communications by employees. Firms may also wish to review and enhance systems to ensure appropriate supervisory and governance measures are in place to ensure compliance with the CEA and Regulations regarding recordkeeping and communications. Firms should document their efforts and communications with the staff of the relevant operating divisions and be sure to raise any self-reporting of potential compliance violations in annual chief compliance reports to ensure that the firm is given self-reporting credit should the matter end up with the Division of Enforcement.

[10] CFTC Releases FY 2024 Enforcement Results, CFTC Release Number 9011-24 (Dec. 4, 2024).

Conclusion

While the Division has been active in recent years in bringing recordkeeping cases amassing historic fines against numerous financial firms, the winds appear to have shifted to the operating divisions with the new Administration. The substantial monetary penalties for these cases appear to have decreased and the number of these types of cases has subsided, with the onus now more on working with the operating divisions to remediate any deficiencies. In doing so, firms should ensure that they have developed and implemented strong procedures to ensure compliance with the relevant rules.