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Meeting regulatory expectations
and business demands for
electronic communications

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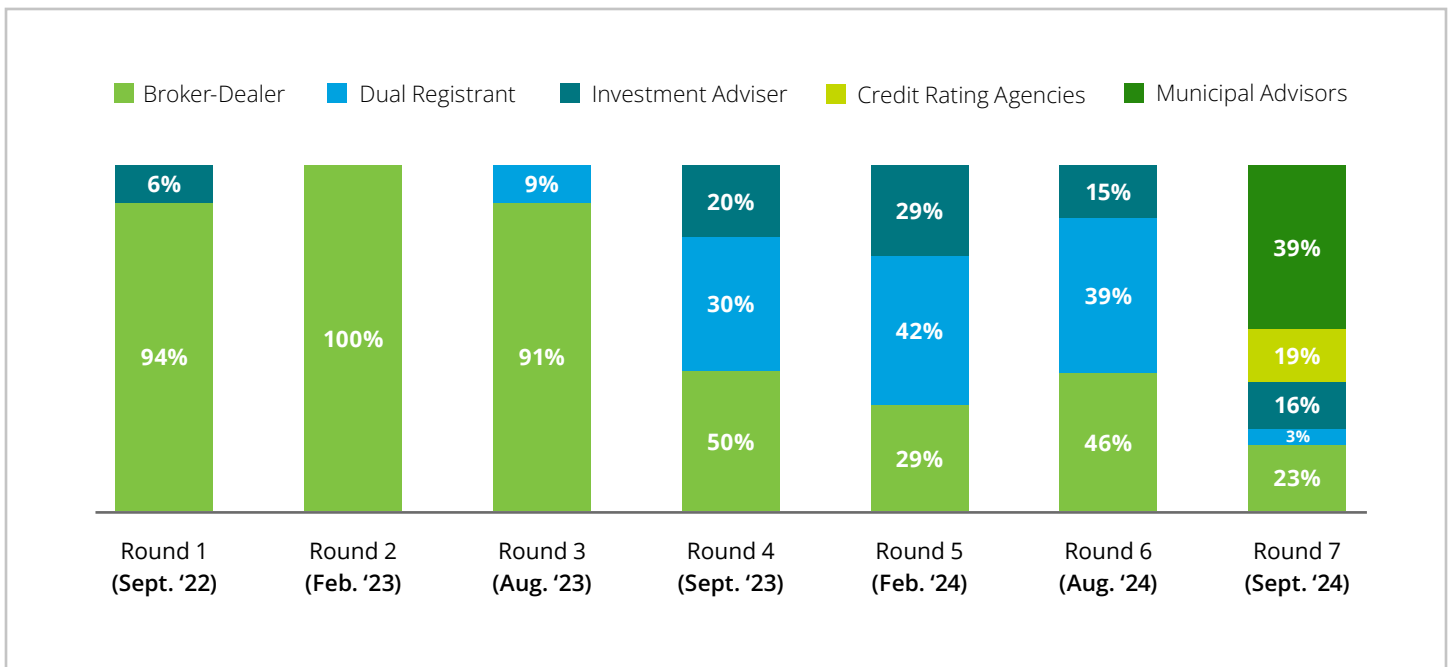
In our digitally driven business environment, electronic communications are increasingly important for conducting business across financial services. Further, maintaining record-keeping, supervision and surveillance practices that meet regulatory expectations is a growing challenge and priority. Firms are contending with a perfect storm of heightened regulatory scrutiny and increasing communication volumes and complexity across various channels, including email, chat, messaging, mobile apps and collaboration platforms.

In recent developments, in August and September regulators announced a number of charges and fines for failures to preserve and maintain electronic communications. On August 14, 2024, the Securities and Exchange Commission (SEC) and Commodity Futures Trading Commission (CFTC) announced a round of charges against twenty-six financial institutions and \$477.7 million in fines in aggregate, ranging from \$400,000 to \$75 million per firm. On September 3, 2024, the SEC announced charges and \$49 million in fines in aggregate against six credit rating agencies, ranging from \$100,000 to \$20 million per firm; and on September 17th, the SEC

announced charges and over \$1.3 million in fines against twelve municipal advisors. Lastly, on September 23rd, 24th and 26th, the SEC and CFTC announced charges against thirteen additional firms and over \$90 million in fines in total. With these August and September rounds, SEC fines now total more than \$2.22 billion, and CFTC fines total more than \$1.21 billion.¹

Since the electronic communications regulatory sweep began in 2021, there have been seven rounds of orders issued. Examining these seven rounds across time, regulators have moved from an initial focus primarily on the broker-dealer arms of tier 1 banks to a focus across financial services. As seen in Chart 1 below, the first three rounds targeted primarily broker-dealers at tier 1 banks, whereas the sweep in rounds four to seven transitioned sharply to target a variety of entities across financial services, including, but not limited to investment advisers, dual registrants and broker-dealers at insurance companies, wealth managers, and investment managers and tier 2 banks.

Chart 1: Percentage of firms fined by entity type¹



¹ Source: Deloitte analysis of SEC ([sec.gov](https://www.sec.gov)) and CFTC ([cftc.gov](https://www.cftc.gov)) enforcement actions as of September 30, 2024.



Further, as the regulatory sweep continues, other government agencies are also increasingly focused on the capture and monitoring of electronic communications, including the US Department of Justice (DOJ), which announced changes to its evaluation of corporate compliance programs in March 2023 to include guidance on electronic communications preservation.

The widening focus of the regulatory sweep across financial services and the additional focus of the DOJ are important developments to consider. Firms of all sizes across financial services—including investment and wealth managers, insurance companies and banks, among others—may wish to assess their electronic communications recordkeeping and monitoring programs. Given the DOJ's guidance, as part of such an assessment, firms also may want to consider casting a wider net around populations subject to electronic communication surveillance recordkeeping requirements and include employees, agnostic of regulatory registration requirements.

On top of the increased regulatory scrutiny, firms also need to consider the trend toward conducting more business digitally. Firms should expect that various stakeholders, including customers, employees and third-party business partners, will likely continue to want to communicate electronically on new channels and in higher volumes than previously.

To meet the growing demands of the business and the heightened scrutiny of regulators, firms should consider assessing how scalable, adaptable and intelligent their electronic communications programs are:

- **Scalable:** The program needs to be able to scale up cost-effectively to handle future increases in electronic communications volumes. If the only option is to hire additional resources, then the firm may wish to explore more cost-effective alternatives.
- **Adaptable:** The program needs to be able to adapt quickly to the evolving needs of the business to communicate in new ways and on new channels. This includes having processes and analytics in place to understand communication trends and patterns, so that future needs are anticipated and the risk of the use of unauthorized channels is mitigated.
- **Intelligent:** The program needs to continually evolve and enhance its surveillance and investigation capabilities (e.g., more sophisticated solutions for detecting true potential issues and decreasing the percentage of false-positive alerts).

Here are some specific actions for firms to consider for making their electronic communications programs more scalable, adaptable, and intelligent.

1. Evaluate service provider solutions to potentially take advantage of the scale, experience and tools and technologies that they may offer:

- a. Service providers may offer cost-effective solutions for scaling program capabilities and supplementing in-house solutions. To manage the growing complexity of monitoring various communication channels and the escalating volumes of electronic communications, some firms are outsourcing their initial (Level 1) surveillance reviews. This approach may leverage service provider technologies and tools to enhance efficiency as well as reduce costs by decreasing the reliance on in-house surveillance teams. It also enables internal teams to concentrate on core activities, such as risk management and investigations of potential issues, all while bolstering the overall effectiveness of the compliance program.
- b. Service providers also may bring to bear the experience of working with multiple firms, and therefore may give insight into how the industry is responding to regulatory and technology developments. For firms that want to make sure that their electronic communications practices are “with the pack” and not outliers, this may be of particular value.
- c. Service providers also may incorporate new technologies and tools, including artificial intelligence (AI), into their solutions. With the technology landscape changing so quickly—from new communication apps to new solutions for the capture, archive and surveillance of electronic communications—firms may benefit from working with a service provider dedicated to evaluating and implementing new technologies to enhance their electronic communications solutions.

2. Assess electronic communications governance, policies, procedures, and practices:

- a. Assess the governance model, including reporting and escalation protocols, and identify areas for enhancing the centralized governance structure around a firm's electronic communications program. Strong governance and coordination between the business, compliance, and technology are vital for making sure that the program can adapt quickly to changes in business, technology and the regulatory environment.
- b. Evaluate the use of BYOD (bring your own device) vs. firm-issued devices. Many firms are now either moving away from BYOD policies or implementing new technologies to more effectively capture and surveil business communications on BYOD devices.

- c. Review internal policies, procedures, and training, and identify gaps in compliance as well as opportunities for enhancement. As part of these efforts, assess investigations and disciplinary processes for potential off-channel electronic communications violations to create a well-documented process that incorporates consistency of application, reporting, and documentation. The results from investigation and disciplinary processes should provide important feedback for enhancing the electronic communications compliance program going forward.
- d. Understand the firm's risk profile around the potential use of off-channel communications by periodically polling employees to understand the electronic communication channels that they are using or would like to use. When asking about historic use, consider offering an amnesty period for the polling. The insights from such polling can help make a program more adaptable and intelligent, by informing a firm's understanding of both communication trends as well as enhancement opportunities (e.g., permitting an additional communication channel or implementing additional surveillance to improve detection of off-channel communications).

3. Conduct analyses on historical electronic communications:

- a. Perform lookback collections to capture historical mobile messages and to determine the prevalence of off-channel communications. These lookbacks may be coupled with a regulatory approach chosen to either correct historic failures or attempt to prove off-channel communications are not pervasive.

- b. Run enhanced lexicons, natural language processing, and AI models on previously surveilled data to assess their effectiveness and determine if new off-channel communications indicators create additional alerts to review and investigate.

4. Identify opportunities to enhance capture, retention, and monitoring/surveillance technologies:

- a. Evaluate enhancement opportunities in the current technology infrastructure for electronic communications recordkeeping and monitoring including 1) enhanced solutions to capture communications from mobile applications; and 2) automated surveillance modules that leverage AI, machine learning, and analytics capabilities to detect potential instances of noncompliance and monitor trends and patterns in communications. As noted above, firms should also consider working with a service provider as a potentially more cost-effective alternative to take advantage of new and emerging technologies.

In an increasingly digital economy, electronic communications have become both essential for conducting business as well as a focus area for regulators. The above activities can help firms enhance their electronic communications compliance programs, while simultaneously supporting the rapidly evolving needs of the business.



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Center for Regulatory Strategy US

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