

Regulatory Perspectives by Theta Lake

2023 Regulatory Priorities from SEC & FINRA: Key takeaways for compliant communications

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At a Glance

Both the [SEC](#) and [FINRA](#) have announced their examination priorities for 2023 giving investment advisers and broker dealers important insight into the areas to include in their compliance monitoring plans. For those tasked with maintaining compliance, security and data privacy across an organization's unified communications there are specific areas to focus on to ensure the continuing deployment and use of platforms meet regulatory expectations, including:

- Cybersecurity and protecting sensitive customer information or confidential firm data from being exposed.
- Establishing effective information barriers and controls to prevent information leakage and the misuse of material, MNPI.
- Monitoring for new communications methods and retaining all correspondence by staff conducting firm business.
- Being able to identify communications containing 'false, misleading, or promissory statements or claims', customer complaints, Form CRS and disclosures.

Key Priorities

The SEC's priorities 'reflect the changing landscape' for investment firms facing volatile markets and the unpredictable impact of new technology. FINRA's report highlights issues that 'remain perennially important, with updates to reflect evolving risks, industry trends and findings' from its recent oversight activities.

Both cite compliance with Regulation Best Interest (Reg BI) and sales practice rules as well as cybersecurity as top priorities. Following the intense scrutiny of workplace communications with more than \$2bn in [fines](#) levied by US regulators for record-keeping and supervision deficiencies over the last year, it's no surprise this critical area remains firmly on the regulatory radar. Given the priorities have been developed from a number of sources including coordination with other regulators, there's every likelihood that similar focus areas will feature in regulators' plans globally, Especially as many aspects such as cybersecurity and the need for effective information barriers are universal challenges.

"The Division has long emphasized the importance of robust broker-dealer compliance and supervisory programs as a proactive measure to ensure compliance with the federal securities laws. This year, the Division intends to focus examinations on broker-dealer compliance and supervisory programs generally, including those for electronic communications related to firm business, as well as the recordkeeping for those electronic communications." - SEC

As well as giving a broad view of priorities, FINRA also provides more granular details of the areas it will scrutinize during examinations, along with valuable examples of effective practices it has observed. Regulators have encouraged firms to incorporate relevant practices into their own compliance programs.

For those tasked with maintaining compliance, security and data privacy across an organization's unified communication platforms there are key areas to focus on to ensure the ongoing deployment and use of communications tools meet regulatory expectations. They cover cybersecurity, supervision, record-keeping, regulatory events reporting, communications and Sales - Regulation Best Interest and Form CRS and communications with the public.

Cybersecurity

Cybersecurity threats continue to be one of the most significant risks, particularly given geopolitical concerns and the proliferation of cyber attacks, and a top priority of both FINRA and the SEC. A key consideration for firms is how to protect sensitive customer information or confidential firm data from being exposed. Effective practices include implementing systems that scan outbound communications and attachments to identify and potentially block sensitive customer information or confidential firm data. In the wider context of collaboration and chat applications, compliance and security teams should keep in mind both the internal and external threats to the use of these systems. For example, insiders may share or send sensitive information such as customer data, personally identifiable information, malware links, sensitive intellectual property, or confidential documents over screen shares, webcams, whiteboards, chats, or file transfers. Externally, threat actors may initiate fraudulent calls or video conferences, attempting to convince employees to share sensitive data.

Supervision

With regards to the need to effectively supervise trading activities, effective practices highlighted by FINRA include developing and maintaining a robust supervisory system to safeguard material, non-public information (MNPI) to prevent front running and insider trading. This includes establishing effective information barriers and controls to prevent information leakage and the misuse of material, MNPI. In the context of modern communications, being able to proactively detect MNPI shared across different platforms and channels, through to enforcing information barriers across multiple platforms and modes of communication are key areas to focus on. Leveraging contemporary compliance systems that track communications across platforms as discussions, for example, migrate from a Slack channel to a Zoom meeting to a Microsoft Teams chat.

Record-keeping

The priorities highlight the obligations relating to Books and Records Rules: (Exchange Act Rules 17a-3 and 17a-4, FINRA Rule 3110(b)(4) and FINRA Rule 4511 which require member firms to create and preserve, in an easily accessible place, all business related communications (e.g. emails, instant messages, text messages, chat messages, interactive blogs). In light of the proliferation and use of modern communication platforms the SEC has stated its intention to focus examinations on compliance and supervisory programs 'for electronic communications related to firm business, as well as the recordkeeping for those electronic communications'. Likewise FINRA has highlighted a number of areas to consider.

Firms should check whether their digital communication policy addresses all channels and features available, whether permitted or prohibited. Equally they should determine whether there are procedures and controls to monitor for new communications methods and retain all correspondence by staff conducting firm business via third party digital communications channels. In terms of addressing blindspots the question is asked: 'Does your firm review for

red flags that may indicate a registered representative is communicating through an unapproved communication channel, and does your firm follow up on such red flags’

Recent **amendments** to Exchange Act Rule 17a-4, which came into effect on January 3, 2023, have modernized electronic recordkeeping requirements, making them adaptable to new technologies in electronic recordkeeping. Along with a new audit-trail alternative to existing preservation requirements, broker-dealers need to be able to produce electronic records in a format that allows regulators to search and sort information on the records. An example of an effective practice is testing recordkeeping vendors’ capabilities to fulfill regulatory obligations by, for example, simulating a regulator’s examinations by requesting records. It’s a critical reminder to firms to check they have complete coverage of all communications available to staff and customers and are able to quickly and comprehensively search and retrieve records for regulators. FINRA has developed a **chart** detailing the significant changes.

Regulatory Events Reporting

The requirement to promptly report specific events including violations and customer complaints to FINRA to meet Regulatory Obligations Rule 4530 (Reporting Requirements) is another area of focus. Deficiencies identified in examinations include firms not conducting regular email and other surveillance for unreported events and written customer complaints prompting FINRA to question “How does your firm monitor for red flags of unreported written customer complaints and other reportable events?”

The effective supervisory practice of conducting email surveillance to identify unreported written customer complaints applies equally across all collaboration and chat conversations, particularly where platforms like Zoom or Slack may be used to engage with clients.

Proactive compliance is key. The need to proactively identify and report issues to the regulator aligns with regulatory warnings following the recent enforcements for unmonitored communications. In the words of Gurbir S. Grewal - Director, SEC Division of Enforcement, (Sept 2022) “This requires proactive compliance, and this type of approach has never been more important than today — a time of rapid and profound technological change.” The use of sophisticated machine learning-enabled systems to flag the video, voice, chat, and email conversations that contain customer complaints or abusive or inappropriate behavior, is critical given the volumes of communications firms need to assess.

Communications and Sales - Regulation Best Interest and Form CRS

Both regulators will continue to prioritize scrutiny of firms’ standard of conduct and obligation to act in a retail investor’s best interest, including compliance with Form CRS. In meeting the SEC’s Reg BI standard of conduct FINRA’s report includes observations relating to identifying and addressing conflicts of interest; disclosing material facts; and delivering Form CRS, which discloses material information about the firm..

Specific considerations include whether firms have adequate controls to assess whether disclosures are provided in a timely manner, and to ensure the delivery of Form CRS and Reg BI-related disclosure documents are tracked. Since communications with customers are taking place across multiple channels, whether messaging, video or email, there are multiple mechanisms to distribute Form CRS and related disclosures, making the deployment of oversight controls for each channel essential. Modern compliance solutions like Theta Lake facilitate compliance by scanning all communications channels, analyzing the contents of conversations and pinpointing when documentation is shared. Interpreting visual components of meetings to identify when a Form CRS is shared over a screen share or webcam or is shared as a chat attachment is critical for compliance.

Communications with the Public

The principles-based standards in FINRA Rule 2210 apply to ongoing developments in communications technology and practices, making it critical that all forms of modern communications meet compliance obligations. Key questions for firms relate to the oversight of those communications including being able to identify whether ‘communications contain false, misleading, or promissory statements or claims’ and whether your firm has ‘established and implemented a reasonably designed supervisory system for communications through mobile apps’

In terms of Digital Communication Channels, findings related to ‘Insufficient Supervision of and Recordkeeping for Digital Communications’. Specifically, not maintaining reasonably designed policies and procedures to identify and respond to red flags that registered representatives may be making business-related digital communications to firm customers using channels not approved and controlled by the firm, including texting, messaging, social media, collaboration apps or “electronic sales seminars” in chatrooms. A point that reinforces the guidance in [FINRA’s FAQs](#) and highlights the need to increase the capture and coverage of communications, from whiteboards through to polling.

Capturing all the dynamic modes of communication including video, voice, chat, as well as emojis, gifs, reactions, images, and embedded links of collaboration and chat tools is fundamental to answering the question “how does your firm supervise and maintain books and records in accordance with SEC and FINRA Books and Records Rules for all approved digital communications? It’s also the bedrock of ‘effective supervision of mobile apps and digital communication channels’.

How Theta Lake can Help

Compliance programs, including resources, technology and plans need to align with regulatory priorities to ensure the compliance and supervisory expectations of FINRA and SEC examinations staff relating to coverage, retention and oversight of communications are met. Equally those responsible for UC communications within a firm should be aware of the continuing regulatory priorities and focus.

Theta Lake's multi-award winning product suite provides patented compliance and security for modern communications utilizing over 100 frictionless partner integrations that include **RingCentral**, **Webex by Cisco**, **Microsoft Teams**, **Slack**, **Zoom**, **Movius** and more. Here's some of the ways Theta Lake can help meet the effective practices FINRA and the SEC will be expecting in examinations:

- Theta Lake captures and compliantly archives communications including videos, voice, email (including attachments), chat, screen share and file transfer from mobile messaging platforms to SMS and WhatsApp to enable compliance with the relevant FINRA and other requirements. It also acts as an archive connector, enabling existing archives and data storage to be utilized without disruption.
- AI-enabled automated detection of potential regulatory issues and requirements including risky URLs, misconduct, promissory statements and complaints through to provision of Form CRS and disclosures. Identified risks are surfaced in an AI-assisted review workflow providing an efficient and effective review process for compliance teams. Theta Lake has more than 85 risk detections which are pre-trained and ready for customer use with customers able to provide feedback and training on the classifiers.
- The ability to ensure that all aspects of messaging can be preserved, and a full audit trail provided to supervisors and regulators. For example, chat messages can be viewed in their native format over the entire history of the conversation with full context retained together with in-meeting communications and images, GIFs, emojis or reactions that change meaning and context.
- The ability to monitor communications, as well as enforce information barriers, across multiple platforms - supporting heightened supervision.
- Theta Lake's suite is SOC2, Type II audited and maps controls to ISO 27001 so confidential, privileged or sensitive data can be automatically redacted to meet data privacy and other legal obligations.
- There's complete flexibility to set retention periods to suit your needs. Rich eDiscovery and search capabilities with capabilities across hundreds of search filters and metadata, as well as free-form text search across what is spoken, shown on screen, shared, or written.

To see how Theta Lake can help your organization safely, compliantly, and cost-effectively respond to evolving regulatory priorities we'd love to [show you](#).