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Litigated Off-Channel Communications Charge Survives Motion to Dismiss: Where Are We on Books and Records?

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In SEC v. Arete Wealth Management LLC, a federal judge in the Northern District of Illinois recently refused to dismiss off-channel communications claims in an SEC case accusing the defendants of engaging in securities fraud. [1] Although the court dismissed certain aspects of the SEC's fraud claims, it rejected arguments that the SEC's books-and-records rule is unconstitutionally vague or fails to provide fair notice to registrants. Nor was the court persuaded that industry-wide practices or the dissatisfaction with the rule expressed by certain Commissioners should deter its enforcement. As the court put it: "as of now, the rules say what they say."[2] So where does that leave registrants who remain subject to those rules?

How Did We Get Here?

First, a brief recap on how we got here. It has been just over a year since the SEC's last major off-channel settlements were announced,[3] concluding a sweep that began in December 2021[4] and ultimately resulted in approximately 100 actions targeting broker-dealers, investment advisers, and other registrants that brought in nine-figure penalties, capturing the attention of the industry. In total, the SEC collected fines exceeding $2 billion.

Adopted several decades ago, well before electronic records let alone cell phones became the norm, the books-and-records rules for many years in effect applied only to the more formal communications that merited memorialization on paper. But in 2021, under Chair Gensler, the SEC began applying the rules to all manner of arguably business-related electronic communications, including exchanges occurring via text messaging applications such as WhatsApp. Industry observers noted that applying the same record-keeping requirements to all electronic communications, which occur at almost every moment in today's world, effectively turned every hallway conversation into a record that firms were required to preserve.[5] The last set of enforcement actions, announced in January 2025 shortly before the change in administration, involved penalties ranging from $600,000 to $12,000,000. Since then, the Commission has not brought any similar actions.[6]

What Has the Current Commission Said?

Not everyone at the Commission was a fan of the off-channel sweep. In September 2024, Commissioners Peirce and Uyeda dissented from an enforcement action against a firm, arguing that "it does not appear that firms have an achievable path to compliance."[7] Now-Chairman Atkins also criticized the enforcement sweep: "That's not how a regulator should have acted."[8] Since becoming Chairman, Atkins and others at the SEC have continued expressing their disapproval of the off-channel sweep,[9] including characterizing it as "a prime example of what happens when regulators fail to accommodate technological and societal changes in how humans actually interact."[10]

Yet when given the opportunity, the Commission has also declined to undo off-channel settlements, including those that respondents argued had resulted in disproportionately high penalties (even among the population subject to the sweep), citing the agency's "strong interest" in preserving the "finality of settlements."[11] Commissioners and senior staff have announced their desire to "work with industry"[12] and have invited registrants to "come talk to us," emphasizing their openness to "collaboration."[13] The Director of Investment Management has recognized that "confusion over what electronic communications fall within the Books and Records Rule (or other retention requirements)" has become even more acute with the rise of AI-generated records.[14]

But thus far—despite requests from the industry asking that the agency amend and modernize its rules[15]—the Commission has as has not indicated that the SEC will formally take up amendments to the books-and-record rules as part of its rulemaking agenda.[16] A rule proposed in 2023 that would potentially have expanded record-keeping requirements in response to AI technology has been formally withdrawn.[17] And thus, as the district court put it in Arete, the rules continue to "say what they say." Indeed, although the Commission has—over the past year—shown itself to be entirely willing to voluntarily dismiss many of the more controversial enforcement lawsuits filed during the previous administration, it has continued to litigate its books-and-records charge against Arete, even when presented with the opportunity to drop the claim while amending its complaint in April 2025.

What Happened in *Arete*?

In Arete, the Commission charged broker-dealer Arete, its affiliated investment adviser, several former registered representatives, and the firm's former chief compliance officer with securities fraud in violation of Sections 10(b) of the Exchange Act and 17(a) of the Securities Act, as well as Advisers Act violations under Sections 206(1) and (2), for selling away and failing to disclose compensation to investors while recommending that they purchase shares in an oil and gas offering subsequently revealed to be a fraud. The SEC alleged that as part of their fraudulent scheme, the registered representatives communicated over text message to conceal their investor

solicitations[18] and separately charged both the firm and the individual defendants with failing to comply, and with aiding and abetting that failure to comply, with record retention requirements.[19]

The defendants filed motions to dismiss the complaint, including a motion by Arete focused exclusively on the books-and-records claim, the only charge against it. Arete argued that the phrase "business as such" in Rule 17a-4 was unconstitutionally vague and that it had been deprived of fair notice, given that the SEC had offered "no meaningful guidance" regarding the scope of the phrase and given that no court has ever interpreted it. Arete further criticized the Commission's decision to "force application of Rule 17(a)(4) to text messages through non-binding and headline-grabbing enforcement settlements," without providing clear guidance and expressly pointed to statements by Chairman Atkins and Commissioners Peirce and Uyeda.[20]

The district court was not moved. Indeed, the court dismissed one of the SEC's fraud theories alleging that two registered representatives violated Section 10(b) by hiding their conduct using off-channel communications,[21] but upheld both the pure books-and-records charge and the charge that those same registered representatives had aided and abetted the record-keeping violation. "It's difficult to imagine what else 'as such' might refer to except broker-dealer matters," the court announced, pasting a color image of a registered representative's text message exchange—complete with a Bitmoji—in the text of its opinion. Parsing the particular text messages at issue, the court concluded without difficulty that they "cover what strikes the court as fundamental broker-dealer business matters: customer solicitations, investments, approvals, and fundraising."[22]

With respect to Arete's policy arguments, the court was similarly unconvinced. In response to Arete's argument that "[a]n industry-wide issue is not evidence of misconduct," but rather of a lack of clear and enforceable standards, the court was dismissive: "it cannot be necessarily true that, at some point, misconduct is excused simply because it recurs."[23] And with respect to the views expressed in Commissioner Peirce and Uyeda's dissent from an off-channel settlement, the court observed that the dissent itself "conclude[d] that the rules should be modernized," but for now, "the rules say what they say."[24]

In upholding the SEC's aiding-and-abetting charge, the court noted that the registered representatives had communicated via text message, despite knowing that Arete had a policy against texting, in an effort to evade review by the firm. From that, the court "infer[red]" that the representatives knew the text messages would not be retained, which the court found to be sufficient on a motion to dismiss.[25] The decision goes no further in parsing the elements of knowing or reckless substantial assistance of a primary violation, leaving wide open the question of precisely what would suffice—and even the possibility that any decision to take a conversation off-channel, whether or not related to evading record-keeping requirements, could be deemed aiding and abetting.

What's A Registrant to Do?

So where does that leave market participants who seek to comply in earnest with their record-retention obligations—while also navigating a world of exponentially increasing digital capture? As has been the case in other contexts, at least one court has now adopted in a litigated context an expansive view of the record-keeping rules that the current Commission has in effect abandoned.[26] How should market participants manage that tension? And how should registrants pursue compliance while faced with an ever-expanding universe of "records" that now includes not only ephemeral messaging, but also AI-agent communications with customers and investors, voice-to-text and transcription technologies, and AI-assisted drafting of disclosures?

- **First,** we recommend that you take the time now to review and enhance your policies and procedures. One factor that Commissioners Peirce and Uyeda found particularly compelling in their Qatalyst dissent was the firm's "well-intentioned" efforts to comply with its obligations; as they noted, "Qatalyst has been working to address the off-channel issue for at least sixteen years."[27] In-house compliance personnel know better than anyone that perfection is not possible, but firms can best position themselves for future exams or enforcement inquiries by demonstrating, over time, continual good-faith efforts to uphold their obligations as gatekeepers and fiduciaries.
- **Second,** watch for new AI rules and guidance. The 2023 rule may have been withdrawn, but we expect the Division of Examinations to play an active role with respect to policing AI usage and communications, particularly now that a permanent Director is in place.[28]
- **Third,** firms should take Commission staff up on their clear invitation to engage in dialogue. As Director Daly put it: "if you have ideas, if you want to explore a pilot program, if you would like to request a no-action letter or staff guidance—come talk to us." Give serious consideration to sharing your firm's experiences complying with the rules—including the challenges you have faced—and consult with outside counsel on how best to start that conversation with the Commission.

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[1] Opinion and Order, SEC v. Arete Wealth Management LLC et al., Dkt. 136, No. 1:25-cv-00616 (N.D. Ill. Feb. 27, 2026).

[2] Op. at 31 n.18.

[3] SEC.gov | Twelve Firms to Pay More Than $63 Million Combined to Settle SEC's Charges for Recordkeeping Failures.

[4] SEC.gov | JPMorgan Admits to Widespread Recordkeeping Failures and Agrees to Pay $125 Million Penalty to Resolve SEC Charges.

[5] Matt Levine, JPMorgan Sent the Wrong Emails, Bloomberg (Dec. 20, 2021), available at https://www.bloomberg.co;lskdjf;alkjfdsm/opinion/articles/2021-12-20/jpmorgan-sent-the-wrong-emails; Matt Levine, Citadel Might Fight for Its Texts, Bloomberg (Sept. 27, 2023), available at https://www.bloomberg.com/opinion/articles/2023-09-27/citadel-might-fight-for-its-texts; Matt Levine, The Deli Was Allegedly a Fraud, Bloomberg (Sept. 28, 2022), available at https://www.bloomberg.com/opinion/articles/2022-09-28/the-deli-was-allegedly-a-fraud?sref=1kJVNqnU; Matt Levine, The SEC Wants To See More Phones, Bloomberg (Feb. 2, 2023), available at

https://www.bloomberg.com/opinion/articles/2023-02-02/the-sec-wants-to-see-more-phones.

[6] Early in 2026, FINRA fined a broker-dealer for an off-channel communications violation, resulting in a penalty of $750,000. See In Re. Benjamin F. Edwards & Co., Inc., FINRA AWC No. 2022073836301 (Jan. 30, 2026).

[7] SEC.gov | A Catalyst: Statement on Qatalyst Partners LP

[8] Stefania Palma, Donald Trump's new SEC appointee scraps aggressive enforcement agenda, FT (Sept. 15, 2025), available at https://www.ft.com/content/55d4c6e5-663b-4b09-a374-1a607f82ad8d.

[9] SEC.gov | Keynote Address at the 25th Annual A.A. Sommer, Jr. Lecture on Corporate, Securities, and Financial Law ("In the past, we have seen examples of enforcement actions in areas, such as retention of books and records, that consumed excessive Commission resources not commensurate with any measure of investor harm.")

[10] SEC.gov | Hoping for Change: Remarks at the Joint Compliance Outreach Program for Municipal Market Professionals

[11] 34-102860.pdf. One of those respondents has continued to challenge their settlement, with the matter currently on appeal in the Fifth Circuit. See Apex Clearing Corp. v. SEC, No. 25-60330 (5th Cir.).

[12] SEC.gov | Hoping for Change: Remarks at the Joint Compliance Outreach Program for Municipal Market Professionals

[13] SEC.gov | Artificial Intelligence and the Future of Investment Management

[14] Id.

[15] Modernizing Communications and Record Retention Rules for Broker-Dealers,Investment Advisers, and Security-Based Swap Dealers (SIFMA and SIFMA AMG) – SIFMA

[16] The Commission's spring 2025 regulatory agenda included a proposed rule relating to books-and-records requirements as applied to crypto assets. View Rule; see also SEC.gov | Statement on the Spring 2025 Regulatory Agenda.

[17] SEC.gov | Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers

[18] Compl. 168 et seq.

[19] Id. 316 et seq.

[20] Mot. at 6.

[21] Op. at 14.

[22] Op. at 31.

[23] Id. at 31 n.18.

[24] Id.

[25] Id. at 32.

[26] The SEC ultimately dismissed crypto-related actions despite courts adopting the SEC's interpretations at the time. See, e.g., Press Release, SEC, SEC Announces Dismissal of Civil Enforcement Action Against Coinbase (Feb. 27, 2025), https://www.sec.gov/newsroom/press-releases/2025-47; SEC v. Coinbase Inc., et al., 726 F. Supp. 3d 260 (S.D.N.Y. Mar. 27, 2024), motion to certify appeal granted, No. 23 CIV. 4738 (KPF), 2025 WL 40782 (S.D.N.Y. Jan. 7, 2025). The SEC has recently dismissed enforcement actions after favorable court rulings in other contexts as well. See, e.g., Litigation Release No. 26495, SEC, SEC Dismisses Civil Enforcement Action Against Former Chief Financial Officer (Feb. 27, 2026), https://www.sec.gov/enforcement-litigation/litigation-releases/lr-26495 (announcing dismissal of Securities and Exchange Commission v. Vidul Prakash, No. 5:23-cv-03300-BLF (N.D. Cal. filed July 3, 2023)).

[27] SEC.gov | A Catalyst: Statement on Qatalyst Partners LP

[28] https://www.sec.gov/newsroom/press-releases/2026-6-keith-e-cassidy-named-director-division-examinations