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## FEDERAL REGULATORS SHARPEN FOCUS ON PERSONAL DEVICE USE AND OFF-CHANNEL COMMUNICATIONS

*Since the COVID-19 pandemic, corporations have reevaluated the way in which they conduct business, including an increased reliance on personal device use and messaging applications. Often, however, these communications are not properly preserved in accordance with certain federal recordkeeping requirements, and, since at least 2021, the SEC and the CFTC have levied multi-million-dollar penalties for such violations. In 2023, the U.S. Department of Justice also issued its own set of guidelines concerning personal device use, making it even clearer that the federal government expects, or perhaps demands, compliance with these rules and guidelines. Given this increased focus on enforcement, the authors advise companies to review and revise their written policies and procedures concerning the preservation and retention of business records and take measures to ensure these policies are enforced. In that connection, they note that open and ongoing conversation with employees, including in the context of custodial interviews, is also paramount and may lead to better identification of relevant communications and data.*

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On February 7, 2023, the U.S. Securities and Exchange Commission's ("SEC") Division of Examinations released its examination priorities, which among other things, highlight recordkeeping and supervisory programs for broker-dealers concerning business-related electronic communications.<sup>1</sup> These priorities, as well as

ongoing SEC enforcement sweeps targeting personal device use, demonstrate the federal regulator's increased focus in recent years on off-channel communications, including bringing high-dollar enforcement actions in connection with violations of long-standing books and records requirements. And the SEC is not alone: recently, the U.S. Commodity Futures Trading Commission ("CFTC") has also taken a stance on financial institutions' unauthorized communications methods, bringing its own slate of enforcement actions resulting in multi-million-dollar penalties. In an August

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<sup>1</sup> U.S. Sec. & Exch. Comm'n, Division of Examinations, 2023 Examination Priorities, page 17, available at <https://www.sec.gov/files/2023-exam-priorities.pdf>.

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