



CONSIDERATIONS FOR OFF-CHANNEL COMMUNICATIONS RECORDKEEPING AND SUPERVISION November 2023

NAMA has developed this Resource to help members consider ways of addressing recordkeeping and supervisory requirements for communications of MA activities. Firms should determine their own policies and procedures and consult counsel as needed. This Resource does NOT serve as legal advice.

As stated in the SEC's MA Rule and as noted throughout MSRB Rules*, Firms are required to maintain records of written communications sent and received that relate to their municipal advisory activities, as defined in Section 15B of the Exchange Act ("MA activities"), regardless of the format that is used for the communication.

In addition to traditional mail and business email correspondences, Off-Channel Communications that are either received or sent, including,

- text messages, iMessages, and any other electronic message;
- chat features in meeting and business platforms, including TEAMS, ZOOM, Bloomberg;
- chat features in social media platforms, for instance LinkedIn or Facebook;
- other electronic communications apps, for instance What'sApp and Signal; and
- personal email accounts

are also considered to be written communications that need to be maintained and preserved by Firms.

As has been discussed in previous compliance forums, Firms are encouraged to adopt a policy prohibiting the use of Off-Channel Communications relating to MA activities, and if warranted, specifically allowing for Off-Channel Communications to be used for certain items, such as logistical or personal matters. Firms should include examples of allowable Off-Channel communications in the policy (e.g., I will be 5 minutes late to the call, may we move the meeting from Monday to Tuesday or Happy Birthday).

The policy should incorporate preserving and maintaining all Off-Channel communications, including client driven messaging, internal messaging and deal team messaging. For example, if a client sends an Off-Channel Communication to a registered representative, the registered representative should be required to respond using a business email, because doing so will enable the Firm to preserve and maintain the Off-Channel Communication within the firm's record keeping system.

Firms are also encouraged to have their registered representatives attest to not using Off-Channel Communications relating to their MA activities. If any Off-Channel Communications are identified (e.g., client driven messaging), the registered representatives should be required to send an original or copy of such Off-Channel Communication so that it is able to be preserved and maintained by the Firm. This would be similar to attestations Firms use internally for political contributions and Rule G-37 filings.

An example attestation to work from may be –

I, _____, attest that I have not used Off-Channel Communications relating to any municipal advisory activities (as defined in Section 15B of the Exchange Act), and adhere to the Firm's Off-Channel Communications policy. If an Off-Channel Communication occurred, the information was forwarded to the firm's system that maintains recordkeeping and is attached hereto for reference.

Firms may wish to include language in their policies that suits the Firm's needs, and thoroughly covers this matter. Depending on what is reasonable for the Firm and the risks that exist or may exist of these types of communications taking place, Firms may wish to consider other actions to comply with recordkeeping and supervision of communications. This could include conducting word searches in emails to see if texts or other Off-Channel Communications are referenced, monitoring Off-Channel communications, and capturing texts and Off-Channel Communications using vendors such as Smarsh and Global Relay.

Finally, Firms should conduct annual training on the Firm's Off-Channel Communications policy, and review the Firm's Off Channel Communications policy in its annual compliance review.

*** Citations**

SEC MA Rule; § 240.15B(a)(1)

(1) Originals or copies of all written communications received, and originals or copies of all written communications sent, by such municipal advisor (including inter-office memoranda and communications) relating to municipal advisory activities, regardless of the format of such communications;

MSRB Rule G-8, Books and Records Made by Municipal Advisors, <https://www.msrb.org/Rules-and-Interpretations/MSRB-Rules/General/Rule-G-8>

MSRB Rule G-44, Supervisory and Compliance Obligations of Municipal Advisors
<https://www.msrb.org/Rules-and-Interpretations/MSRB-Rules/General/Rule-G-44>

Resources

NAMA November 2023 Webinar, Off Channel Communications – slide deck,
<https://nama2.memberclicks.net/assets/offchannelNOV2023updated.pdf>

SEC Observations from Investment Adviser Examinations Relating to Electronic Messaging,
<https://www.sec.gov/files/OCIE%20Risk%20Alert%20-%20Electronic%20Messaging.pdf>

FINRA Notice – Supervision of Electronic Communications,
<https://www.finra.org/sites/default/files/NoticeDocument/p037553.pdf>

SEC MA Risk Alert (general), August 2022, <https://www.sec.gov/municipal-advisor-risk-alert-2022.pdf>