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SEC Settles Charges with Investment Adviser for Off-Channel Communications Recordkeeping Failures

by David Tang and Michael Schmieder

The SEC recently announced charges against Senvest Management, LLC ("Senvest"), a registered investment adviser with approximately $3 billion in regulatory assets under management, for failures to maintain and preserve certain "off-channel" electronic communications.[1]

The SEC's order stated that, from at least January 2019 through December 2021, Senvest employees at various levels of authority communicated about firm-related business internally and externally using personal texting platforms and other non-Senvest electronic communication services that the SEC referred to as off-channel communications. The SEC found that, as a result, Senvest did not retain a substantial majority of these off-channel communications.

The SEC further noted that three senior employees engaged in business communications using personal devices set to automatically delete messages after 30 days. These automatic deletions prevented Senvest from recovering certain messages that it was required to maintain under the Investment Advisers Act ("Advisers Act") and the firm's policies and procedures. During this period, Senvest responded to record requests and subpoenas from the SEC. Accordingly, Senvest's recordkeeping failures could have impacted the SEC's ability to carry out its regulatory functions and investigate violations of the federal securities laws.

Unrelated to off-channel communications, certain Senvest employees failed to obtain pre-clearance for all securities transactions in their personal trading accounts in violation of the firm's code of ethics, and Senvest supervisors failed to ensure that personal trading reviews were conducted in a timely fashion.

The SEC concluded that Senvest violated certain recordkeeping and code of ethics requirements of the Advisers Act and failed reasonably to supervise certain Senvest employees with a view to preventing violations.

Senvest admitted the facts set forth in the SEC's order, acknowledged that its conduct

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violated the federal securities laws, and agreed to pay a $6.5 million penalty. Senvest agreed to retain a compliance firm to review its policies and procedures relating to the retention of electronic communications found on personal devices and the framework for addressing non-compliance with those policies and procedures.

Dorsey Observations

Beginning with the largest broker-dealers and investment advisers, the SEC has continued to charge firms with recordkeeping violations relating to off-channel communications.[2] Senvest is the first enforcement action related to off-channel communications against a stand-alone investment adviser since the SEC started its sweep.

Registered investment advisers should review their use and retention of off-channel communications about firm-related business to ensure that these communications are maintained as required by the Advisers Act and the firm’s policies and procedures. Advisers should use only those methods of electronic communications for business that can be retained and archived. Employees and supervisors should be trained and reminded to use company-approved methods of electronic communications and adhere to all applicable recordkeeping requirements. Automatic message deletion settings should be turned off to the extent they prevent the firm from recovering and retaining required records.

Dorsey’s compliance services are available to advise on compliance relating to off-channel communications.

[1] See In the Matter of Senvest Management, LLC, Release No. 6581 (April 3, 2024) available at https://www.sec.gov/files/litigation/admin/2024/ia-6581.pdf.

[2] See SEC Press Releases: “JPMorgan Admits to Widespread Record Keeping Failures and Agrees to Pay $125 Million Penalty to Resolve SEC Charges” available at https://www.sec.gov/news/press-release/2021-262; “SEC Charges 16 Wall Street Firms with Widespread Recordkeeping Failures” available at https://www.sec.gov/news/press-release/2022-174; “SEC Charges HSBC and Scotia Capital with Widespread Recordkeeping Failures” available at https://www.sec.gov/news/press-release/2023-91; “SEC Charges 11 Wall Street Firms with Widespread Recordkeeping Failures” available at https://www.sec.gov/news/press-release/2023-149: “SEC Charges 10 Firms with Widespread Recordkeeping Failures” available at https://www.sec.gov/news/press-release/2023-212?utm_medium=email&utm_source=govdelivery; and “Sixteen Firms to Pay More Than $81 Million Combined to Settle Charges for Widespread Recordkeeping Failures” available at https://www.sec.gov/news/press-release/2024-18?utm_medium=email&utm_source=govdelivery.