

SEC Enforcement Case Summary Off-Channel Communications Self-Reporting by Investment Adviser Avoids Penalty

On September 23, 2024, the SEC brought charges against Texas-based registered investment adviser, Atom Investors LP, for its failure to maintain and preserve off-channel communications in violation of the recordkeeping provisions of the federal securities laws. However, the SEC did not impose a penalty because Atom Investors self-reported the conduct, promptly remediated the violations, and provided substantial cooperation to Commission staff in an investigation of another entity.

The SEC's order notes that Atom personnel, including at senior levels, regularly used their personal mobile devices to receive and send numerous off-channel communications with other Atom employees or known contacts at another entity. Accordingly, such personnel sent and received off-channel communications related to recommendations made or proposed to be made and advice given or proposed to be given in their advisory business, as well as related to the placing and execution of orders to purchase and sell securities for investment advisory clients. However, Atom failed to retain a portion of these communications, including communications that it was required by law to keep under the Books and Records Rule 204-2 of the Advisers Act. These off-channel communications were identified when responding to the Commission staff's subpoena related to another entity, when the firm identified that it had improperly failed to preserve records subject to the recordkeeping requirements of the federal securities laws, including records that were responsive to the staff's subpoena.

After discovering the off-channel communications, Atom voluntarily conducted an internal review to identify the scope of the use of these communications and to collect and retain communications. Atom took remedial actions by making changes to its compliance program in an effort to prevent future non-compliance with its recordkeeping obligations, including providing firm-wide in person training by outside counsel.

Atom further cooperated in the SEC's investigation of another entity, undertaking efforts to retrieve, analyze, and organize trading data to match orders directed by the other entity to execution data. The SEC order noted that Atom's cooperation helped conserve resources, enabling SEC staff to focus on other areas of the investigation.

As a result of such remedial efforts and cooperation, although the SEC did bring a public enforcement action, it did not charge the firm a civil penalty. This case highlights that it clearly is in investment advisers' best interest to conduct internal reviews to identify any unarchived business communications. Ideally firms will be able to get ahead of any SEC examination or enforcement inquiry that might uncover off-channel communications. In the event of pervasive violations, it may be in the firm's best interest to self-report such failures to the SEC.

See Summary - <https://www.sec.gov/newsroom/press-releases/2024-143>