

# Managing Compliance

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## E-communication with clients is useful, but . . .

It is often expedient and effective to communicate with clients electronically, and almost every broker-dealer and investment adviser does it. However, with respect to particular mandated communications (and some others) such as privacy notices or deliveries of Form ADV, it is not sufficient to simply push “send” and be done with it.

Firms have an obligation to know that the communications (and attachments) they send to clients actually reach them, and this can be a problem in e-communications. One can argue that it is also a problem with snail mail, but the SEC doesn’t see it that way. The SEC assumes that the postal service provides a reliable means of delivery, and this presumption of reliability is even recognized by the courts.

I urge my clients to use e-communications to deliver mandated disclosures, etc. But there are things that must be in place before firms can rely on this method of communication and delivery of important documents. Among other things, firms must get the **informed consent** of the client to use electronic means of communication and delivery of documents.

What follows are excerpts from the SEC’s interpretive release concerning electronic delivery of information to clients. I’ve cut it down for easier consumption. I urge

you to read it and keep it handy, even incorporating the language into your own

compliance and operations procedures (properly edited for your own firm, of course).

Remember, the point is not to be afraid of using electronic delivery methods, but to make sure that if you do, you won’t have regulatory headaches down the road.



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What follows is from SEC Release Release(s) 33-7288; 34-37182; IC-21945; IA-1562 File No. S7-13-96

### Notice

Broker-dealers, transfer agents, and investment advisers providing information electronically should consider the extent to which electronic communication provides timely and adequate notice that such information is available electronically. When information is delivered on paper through the postal mail, recipients most likely will be made aware that they have received information that they may wish to review and, therefore, separate notice is not necessary. Information transmitted through electronic media, however, may not always provide a similar likelihood of notice that information has been sent that the recipient may wish to review. Broker-dealers, transfer agents, and investment advisers, therefore, should consider whether it is necessary to supplement the electronic communication with another communication that would provide notice similar to that provided by delivery in paper through the postal mail.

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## Access

The [SEC] believes that customers, securities holders, and clients who are provided information through electronic delivery from broker-dealers, transfer agents, and investment advisers should have access to that information comparable to that which would be provided if the information were delivered in paper form. Thus, the use of a particular medium should not be so burdensome that intended recipients cannot effectively access the information provided. Also, persons to whom information is sent electronically should have an opportunity to retain the information through the selected medium or have ongoing access equivalent to personal retention.

## Evidence to Show Delivery

Providing information through postal mail provides reasonable assurance that the delivery requirements of the federal securities laws have been satisfied. The [SEC] believes that broker-dealers, transfer agents, and investment advisers similarly should have reason to believe that electronically delivered information will result in the satisfaction of the delivery requirements under the federal securities laws. Thus, whether using paper or electronic media, broker-dealers, transfer agents, and investment advisers should consider the need to establish procedures to ensure that applicable delivery obligations are met.

Broker-dealers, transfer agents, and investment advisers may be able to evidence satisfaction of delivery obligations, for example, by: (1) obtaining the intended recipient's informed consent to delivery through a specified electronic medium, and ensuring that the recipient has appropriate notice and access, as discussed above; (2) obtaining evidence that the intended recipient actually received the information, such as by an electronic mail return-receipt or by confirmation that the information was accessed, downloaded, or printed; or (3) disseminating information through certain facsimile methods.

In order to ensure that information is delivered as intended, broker-dealers, transfer agents, and investment advisers delivering information using either electronic or paper-media should take reasonable

precautions to ensure the integrity and security of that information.

## Personal Financial Information

Certain information that broker-dealers, transfer agents, and investment advisers deliver is specific to a particular person's personal financial matters ("Personal Financial Information"). For example, the information reported to customers under Exchange Act Rule 10b-10 relates to specific securities transactions and includes the identity and number of shares bought or sold and the net dollar price for the shares. Under Exchange Act Rule 10b-16, a broker-dealer that imposes finance charges on a customer's account during a quarterly period must deliver a quarterly statement disclosing, among other things, the account's beginning and closing balances, debits and credits entered during the period, the interest charged, and the rate or rates of interest. Similarly, under Advisers Act Rule 206(3)-2, investment advisers engaging in agency cross transactions involving clients are required to send the clients disclosure about those transactions.

## Confidentiality and Security

Broker-dealers, transfer agents, and investment advisers sending Personal Financial Information should take reasonable precautions to ensure the integrity, confidentiality, and security of that information, regardless of whether it is delivered through electronic means or in paper form. The [SEC] believes that broker-dealers, transfer agents, and investment advisers transmitting Personal Financial Information electronically must tailor those precautions to the medium used in order to ensure that the information is reasonably secure from tampering or alteration.<sup>1</sup>

## Consent

Because of the need to maintain the confidentiality and security of Personal Financial Information, it is important that the intended recipient is willing to accept the delivery of such information through electronic media

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<sup>1</sup> Consider using encryption software, which is mandated in certain jurisdictions (e.g., Massachusetts) when delivering personal information.

and has actual notice that the Personal Financial Information will be delivered electronically. Therefore, in order to ensure that Personal Financial Information can be delivered in a manner that maintains the information's confidentiality, unless a broker-dealer, transfer agent, or investment adviser is responding to a request for information that is made through electronic media or the person making the request specifies delivery through a particular electronic medium, the broker-dealer, transfer agent, or investment adviser should obtain the intended recipient's informed consent **prior to** delivering Personal Financial Information electronically. This consent will ensure that the intended recipient is willing to accept the delivery of Personal Financial Information through electronic media and has actual notice that the Personal Financial Information will be delivered electronically. The [SEC] believes that such consent by the customer or client to the delivery of Personal Financial Information may be made either by a manual signature or by electronic means.



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