

Enforcement Alert **Retain even your contract reps'** **business-related e-mail—or risk fines**

Make sure you have ready access to the e-mail communications that reps are using to conduct business for your firm – even if those reps aren't your immediate employees. That's the takeaway from a recent FINRA enforcement action.

Regardless of whether the rep is independent, the reps should be required to use your e-mail system, says **Amy Lynch**, president of **FrontLine Compliance LLC**, a regulatory compliance consulting firm based in Leesburg, Va. and New York. At the very least, don't allow them to use outside accounts unless they can be immediately captured by your e-mail system, she adds.

Similar advice comes from **Steve Ganis**, an attorney at **Mintz Levin's** Boston office. "Although the action addresses a mutual fund distributor, the message is especially critical for BDs with the 'independent broker' model where registered reps are the BD's contractors, but not its employees," Ganis says.

"BDs with contractor reps should inventory all business books and records in their reps' possession (including faxes, emails, instant messaging, etc.) that might be deemed covered by Rule 17a-4, analyze whether each category is easily accessible and covered by the BD's written supervisory procedures

and internal controls, and address any gaps," Ganis advises.

The details of the case—and its lessons

FINRA recently censured and fined **Foreside Distribution Services, L.P.** \$100,000. The Portland, Maine-based company, which provides distribution services to the mutual fund industry, failed to retain all business-related electronic communications, FINRA said. It was supposed to keep those communications at least three years, the first two years in an easily accessible place. But it didn't have a supervisory system or WSPs to make the e-mails easily retrievable, the FINRA settlement document noted.

From at least August 2007 to October 2008, Foreside's registered reps either worked directly for the firm or for Foreside's investment adviser clients.

Those IA clients kept the business e-mails sent and received by the non-Foreside employed registered reps. The only way Foreside could obtain them was by asking each IA client for the records, a violation of FINRA's Exchange Act Rule 17a-4 and NASD Conduct Rules 3110 and 2110. In addition, Foreside's WSPs were silent about the issue. Then, in August 2008, Foreside amended its WSPs. But the revised procedures were deficient because they relied on the IA clients to retain the communications on the clients' systems and didn't ensure easy access, FINRA noted.

Double whammy for repeated offense

This is the second time FINRA cited Foreside for such violations. In December 2005, NASD censured and imposed a \$50,000 fine against the firm, which at that time was known as **Bisys Fund Services Limited Partnership** and was under different management and ownership.

Lynch says this history provides another lesson: "Be prepared for double the fine if you're a repeat violator. And this was a small fine. Can you imagine if it were a million-dollar fine?" ■

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