



NEW YORK  
CITY BAR

**COMMITTEE ON INVESTMENT  
MANAGEMENT REGULATION**

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Meyer Eisenberg, Esq.  
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Securities and Exchange Commission  
450 Fifth Street, N.W.  
Washington, D.C. 20549-0609

**RE: Electronic Maintenance of E-mail by Registered  
Investment Advisers**

Dear Mr. Eisenberg:

On behalf of the Committee on Investment Management Regulation of the Association of the Bar of The City of New York (the "Committee"),<sup>1</sup> I am writing to follow up on the June 21, 2005 meeting between members of the Committee and you and other senior staff members in the Commission's Division of Investment Management and Office of Compliance Inspections and Examinations.

By way of background, the primary purpose of the June meeting was to discuss the Committee's letter to the Commission, which outlined the Committee's serious concerns about the regulatory ambiguities surrounding an investment adviser's obligations under the Investment Advisers Act of 1940 (the "Act") and its rules relating to storage and production of e-mail.<sup>2</sup> Among other things, the Committee's letter noted that, due to confusion over the requirements of

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<sup>1</sup> A list of Committee members and their affiliations is attached.

<sup>2</sup> Letter from the Committee to the Securities and Exchange Commission (May 11, 2005), available at <http://www.sec.gov/rules/petitions/petn4-503.pdf>.

the Act and rules, many investment advisers simply retain all e-mail for five years out of an abundance of caution. Retaining all e-mail, however, is becoming increasingly burdensome, the letter pointed out, because of the explosive growth in the use of e-mail in recent years.

At the June meeting, the staff confirmed that Rule 204-2 under the Act requires a registered adviser to retain, not all e-mail, but only e-mail containing the information otherwise required to be preserved under Rule 204-2. Further, the staff at the meeting indicated that an adviser could, consistent with its Rule 204-2 obligations, permanently delete e-mail from its system, if it implemented reasonable procedures to ensure that e-mail containing Rule 204-2 information was being properly retained. In that regard, the staff asked the Committee to propose an example of those procedures.

In response to the staff's request, the Committee attempted to draft a proposed set of procedures for e-mail retention. In doing so, the Committee consulted with many different firms and industry groups.<sup>3</sup> It eventually became apparent, however, that, in light of the great diversity of firms and interests in the field, it would be impossible to produce a draft that could be successfully implemented by all advisers. For example, some large advisers might require automated procedures, while some small advisers might prefer to rely on their employees to determine what must be retained. Further, advisers that are dual registered as broker-dealers have different concerns than those advisers that are not.

In lieu of one-size-fits-all procedures that might be difficult for some advisers to implement, the Committee believes that it would be more beneficial for the Commission to articulate guidelines on which e-mail retention procedures could be based. Consequently, we ask that the Commission provide such guidelines and then state that it would deem procedures based on those guidelines to be reasonable retention procedures for purposes of permitting an adviser permanently to delete e-mail. To assist the Commission in developing such guidelines, we propose guidelines below. In describing our suggested guidelines, we have distinguished between (i) e-mail retention procedures that rely on an individual to decide in the first instance whether an e-mail must be retained and (ii) those procedures that rely on technology to sort e-mail required to be retained from that which is not. We believe that it is useful to make this distinction, because, given the differences between the approaches, the guidelines which they must follow will naturally differ as well. We would like to emphasize our belief that reasonable procedures could be developed under either the individual-based or the technology-based approach. Moreover, reasonable procedures could well incorporate a mix of both approaches<sup>4</sup> or even retention of all e-mail.<sup>5</sup>

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<sup>3</sup> For example, the Committee consulted with the Securities Industry Association and Managed Funds Association, both of which provided valuable input on this letter.

<sup>4</sup> For example, an adviser relying on individual employees to make the initial decision as to whether an e-mail should be saved, could also reasonably use an e-mail filter to delete "spam" or "junk e-mail" before it even reached the electronic mailbox of the employees.

<sup>5</sup> For example, some advisers might reasonably determine to retain all e-mail sent or received by employees whose position indicates that the e-mail was very likely to contain Rule 204-2 information, while at the (...continued)

The Committee proposes the following guidelines:

- 1) All e-mail retention procedures must:
  - a) Consider (i) the investment adviser's type of business, number of accounts, number of employees, types of employees, and number of offices and (ii) any other factors that would affect the adviser's policies and procedures on general record retention.
  - b) Require that e-mail containing information required to be retained by the adviser under Rule 204-2 (such e-mail, "Required E-mail"; such information, "Required Information") be treated in conformity with any other policy or procedure of the adviser applicable to the type of Required Information contained in such Required E-mail, such as policies and procedures relating to client communications.
  - c) Provide for the identification and preservation of Required E-mail as follows<sup>6</sup>:
    - i) With respect to individual-based procedures, appropriate employees must be informed of and trained on the requirements for saving Required E-mail and must be required to save a copy of any Required E-mail in an electronic storage folder.<sup>7</sup>
    - ii) Technology-based procedures may consist of, but need not be limited to, a system whereby Required E-mail is identified and sorted for storage in an electronic storage folder based on: (1) automated evaluation of the identity of the sender or the recipient of the e-mail and/or (2) manual or automated search to identify initially Required E-mail by the use of keywords.
  - d) Provide for a qualified person to supervise the retention of Required E-mail as follows:

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(continued...)

same time using automated filters to sort the e-mail of the other employees at the firm. Further, some advisers might reasonably determine simply to continue retaining all e-mail at the firm.

<sup>6</sup> These guidelines primarily contemplate the maintenance of Required E-mail in electronic format, but as indicated below, the Committee believes that an adviser may also preserve Required E-mail in paper format.

<sup>7</sup> Where an individual-based approach is used, we believe that e-mail need not be treated differently than paper. Thus, just as many reasonable paper-document retention procedures require employees to submit Rule 204-2 documents to a central file for preservation, we believe that reasonable e-mail retention procedures may rely on the e-mail user to determine whether the e-mail must be retained and to submit such e-mail for centralized storage.

- i) With respect to individual-based procedures, a compliance officer (or a designee) must test the adviser's compliance with the e-mail retention procedures by examining the contents of the electronic file in which Required E-mail is retained.<sup>8</sup>
    - ii) With respect to technology-based procedures, a compliance officer (or designee) must periodically evaluate whether Required E-mail is being appropriately preserved. As an acceptable minimum, the compliance officer (or designee) must periodically examine (by, for example, using keyword and source searches) both the folder of retained e-mail and other e-mail on the system in order to evaluate whether the procedures are performing reasonably.
  - e) Require that the e-mail identified as Required E-mail by the adviser's retention procedures ("Retained E-mail") that is maintained in electronic format by the adviser be maintained in accordance with the requirements of Rule 204-2(g) pertaining to records preserved on electronic storage media.
  - f) Require that Retained E-mail be maintained for the period of time stipulated by the adviser's policies and procedures applicable to the Required Information contained in the e-mail.
- 2) An adviser's procedures may permit the adviser to:
- a) Authorize its employees to delete Required E-mail from their electronic mailboxes after a copy of the Required E-mail has been saved in the storage folder.
  - b) Delete permanently, either manually or automatically, any e-mail that has resided on its system for at least four weeks and has not been identified as Required E-mail pursuant to the adviser's retention procedures.
  - c) Choose to retain all e-mail.
  - d) Choose to maintain Required E-mail in paper format.<sup>9</sup>

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<sup>8</sup> Again, this procedure is consistent with the notion of treating e-mail like paper for purposes of individual-based procedures. Specifically, just as compliance officers (or their designees) would test compliance with paper-document retention procedures by inspecting the contents of the central files, we believe that reasonable e-mail procedures of this type may rely on similar inspection of a central e-mail file. Moreover, just as a compliance officer would not rifle through employees' offices or trash bins looking for Rule 204-2 paper documents, we think that reasonable e-mail retention procedures of this type need not require a compliance officer to monitor employees' e-mail accounts actively or to search through their deleted e-mail.

<sup>9</sup> If an adviser chooses to retain Required E-mail in paper format, the Committee believes that a reasonable procedure would be for the adviser to print the e-mail and then maintain it pursuant to the adviser's policies and procedures applicable to the Required Information contained in the e-mail. The Committee believes that reasonable procedures could then permit the electronic version of the e-mail to be permanently deleted from the adviser's system.

- 3) An adviser's procedures may permit the adviser to use e-mail filters to delete "spam" or "junk e-mail" before it reaches the electronic mailboxes of its employees without any duty on the part of the adviser or its employees to review such spam or junk e-mail before it is permanently deleted.<sup>10</sup>

We are very grateful for the opportunity to submit our views for the Commission's consideration. We believe that Commission acknowledgement that e-mail may be deleted in accordance with procedures based on guidelines such as those described above would be an important step toward resolving some of the ambiguities that have plagued this field.

The Committee would be pleased to answer any questions you might have in this regard, and to meet with the staff if it would assist the Commission's efforts.

Very truly yours,

Stuart H. Coleman  
Chair

Drafting Member

Nora M. Jordan

cc: Hon. Christopher Cox  
Hon. Paul S. Atkins  
Hon. Roel C. Campos  
Hon. Cynthia A. Glassman  
Hon. Annette L. Nazareth  
Ms. Lori A. Richards

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<sup>10</sup> If the adviser does review spam or junk mail and Required Information is found, the e-mail containing Required Information should of course be maintained in accordance with the adviser's e-mail retention procedures.

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