



BlackBerry in the Regulatory Spotlight:

The NYSE and NASD Provide Compliance Guidance To Member Firms Regarding “Non-Member E-Mail Platforms” and “Personal Electronic Communication Devices”

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Executive Summary

The NYSE and NASD recently issued a “Joint Guidance” that clearly articulated, for the first time, that a broker-dealer’s obligation to review correspondence between its registered representatives and customers extends to all forms of electronic communications. In the Joint Guidance, the regulators specifically instructed broker-dealers to prohibit their employees from using “Non-Member E-Mail Platforms” or their own “personal electronic communication devices” to communicate electronically with customers, unless the broker-dealers are able to capture, preserve, and conduct a supervisory review of all such electronic communications.

The Joint Guidance raises significant compliance issues for brokerage firms with employees who communicate electronically with customers through handheld wireless communication devices, such as BlackBerry® smartphones. Compliance with the Joint Guidance is relatively simple when employees use firm-issued devices to send and receive email through their firm-assigned email addresses residing on the firms’ servers. Compliance becomes more complicated, however, where employees communicate with customers through the alternative electronic networks available on their firm-issued devices, such as text messaging, instant messaging, webmail, and device-to-device messaging. Unlike secure email, these communications are not automatically routed to the firms’ servers for retention and review.

Broker-dealers are therefore faced with a dilemma. Without the ability to capture and review these alternative forms of electronic communication with customers, they must prohibit such communications, or run afoul of the regulations. On the other hand, an outright prohibition against these device-based electronic communications could lead to a loss of business opportunities, competitive advantage, and customer goodwill.

The good news is that third-party compliance vendors anticipated the recent regulatory pronouncement, and have developed software that may be installed on employees’ handheld wireless devices that can capture any and all forms of electronic communications transmitted to and from the devices, and route them to the firms’ mail servers on a real-time or end-of-day basis for preservation and supervisory review. This simple yet comprehensive solution enables registered representatives and customers to communicate with each other in the electronic format of their choice, while ensuring that firms are in compliance with their regulatory obligations.

Broker-dealers should consult with device manufacturers concerning the availability and viability of these software solutions for their devices.

Introduction

Wireless handheld communications devices, like the BlackBerry smartphone, became fixtures on Wall Street before the turn of the last century. Until this summer, however, the securities regulators have been relatively silent regarding the compliance issues surrounding such devices.

In June 2007, the New York Stock Exchange (“NYSE”) and the National Association of Securities Dealers (“NASD”), the main self-regulatory organizations (“SROs”) for brokerage firms,¹ issued a Joint Guidance (the “Joint Guidance”) that impacts the widespread use of wireless handheld devices by registered representatives for electronic communications with customers.

The Joint Guidance makes crystal clear that brokerage firms are required to preserve and perform supervisory reviews of all forms of electronic communications transmitted through employees’ handheld devices, including email, webmail, text messages, instant messages, and device-to-device messages. Broker-dealers immediately must take all appropriate measures to ensure they are in compliance with this directive.

This white paper will address the alternatives available to broker-dealers for compliance with the Joint Guidance, and the competing concerns broker-dealers must weigh in determining which compliance solution is appropriate for their particular organizations.

Regulation Of Electronic Communications

The Joint Guidance may only be fully understood in historical context. Since 1938, Securities and Exchange Commission (“SEC”) Rule 17a-4 has required broker-dealers to preserve communications relating to their “business as such” for a three year period.² In 1997, the SEC announced an “interpretation” of this rule that required broker-dealers to retain all emails “which relate to the broker-dealer’s ‘business as such.’”³

At the same time the SEC issued its interpretation, it issued a new rule, 17a-4(f), that gave broker-dealers the option to preserve any required book and record in electronic format.⁴ The conditions of the rule are very stringent and complex.⁵ Because emails are electronic records in the first instance, Rule 17a-4(f) became the definitive method for archiving business emails for record retention purposes.⁶

As a result of the SEC’s interpretation and rulemaking, broker-dealers not only were required to preserve the huge volumes of external and internal emails and attachments transmitted daily through their servers, but also were required to archive those emails for three years in accordance with an elaborate and costly storage regime.⁷

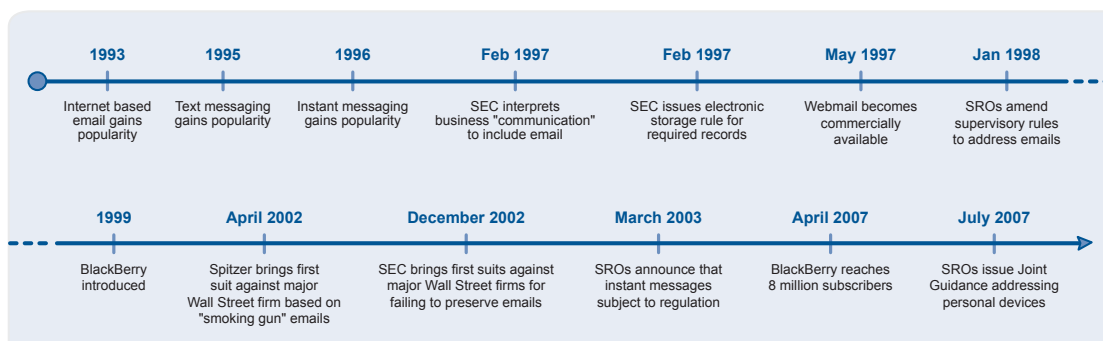
The SEC’s email interpretation also had a profound effect on existing SRO supervisory rules. At the time, the NYSE and NASD rules required principals of broker-dealers to review and approve all incoming and outgoing correspondence of registered representatives with the public to ensure compliance with applicable securities laws and regulations.⁸ In light of the SEC’s interpretation that emails were business communications that were subject to regulation, the SRO rules now required broker-dealers to conduct a supervisory review of each of the thousands of emails exchanged daily between their customers and their registered representatives.

The SROs quickly amended their rules in early 1998 to give broker-dealers the flexibility to design email supervisory procedures that were appropriate to their structure, nature and size of business, and customer base. This flexibility included the option to eliminate “pre-use” review of all incoming or outgoing email.⁹

The SROs also instructed member firms to prohibit their employees from communicating with the public from home computers, or through third party systems, unless the firms are capable of preserving and monitoring the communications.¹⁰ The SROs also approved the use of “reasonable sampling techniques” by broker-dealers in conducting their reviews of email correspondence (e.g., firms could review 10%, rather than 100% of emails).¹¹

In 2003, five years after the SROs’ supervisory rule amendments, the SROs determined that Instant Messages (“IM”) were no different than emails for purposes of the retention and supervisory rules.¹²

Timeline



Regulation Of Wireless Handheld Devices Prior To The Joint Guidance

Prior to the Joint Guidance, the NASD never specifically addressed supervisory issues arising from the use of wireless handheld devices.¹³ The NYSE, on the other hand, has been wrestling with handheld wireless device issues for years, because the Exchange severely limits and controls communications on, to, and from its trading floor.¹⁴

The NYSE has never welcomed BlackBerry smartphones or similar devices on its trading floor.¹⁵ In a 2003 memo to member firms, the NYSE's Division of Market Surveillance stated:

consistent with Specialist Post Wire Policy, specialists and specialists' trading assistants are not permitted to use on the Exchange Floor any wireless communications devices known as a "Blackberry" or any other such portable device that would enable a specialist to communicate from the Floor to an off-Floor location.

. . . The current prohibition against "Blackberries" extends to all members and employees of member organization on the Floor . . .¹⁶

In 2004, the NYSE considered a change in its policy towards the use of BlackBerrys on the trading floor. The NYSE submitted to the SEC a proposal to modify its wireless communications policy to permit non-specialist members and their employees to use certain personal or firm-issued, licensed, wireless communications devices on the Floor, subject to certain conditions and exceptions.¹⁷ The NYSE stated in its rule proposal that: "Examples of acceptable personal licensed wireless devices are . . . RIM 'Blackberry' messaging devices."¹⁸ The NYSE stated in the proposal that the use of any BlackBerry-type device would have to comply with all applicable rules pertaining to communications to and from the trading floor, including but not limited to the record retention requirements of SEC Rule 17a-4.¹⁹

On November 1, 2004, without explanation, the NYSE withdrew its proposed amendments to its Wireless Communications Policy.²⁰ Thereafter, in an April 2005 Bulletin, the NYSE Division of Market Surveillance reminded members that the Exchange's Wireless Policy "prohibits use of such devices as 'BlackBerrys' . . ."²¹ The NYSE Staff punctuated the announcement with the following admonition: "Violations of these provisions could subject members, member organizations and their employees to regulatory action."²² The NYSE's BlackBerry prohibition was reiterated as recently as a few months ago.²³

The Joint Guidance

On June 14, 2007, the NASD and NYSE requested comment on a “Proposed Joint Guidance Regarding the Review and Supervision of Electronic Communications.”²⁴ In the Executive Summary, the regulators stated:

Given the pace of technological innovations in electronic communications, and the breadth of possible communications subject to review, NASD and NYSE are issuing this Joint Request for Comment to solicit comments from members and other interested parties on proposed Joint Guidance regarding the review and supervision of electronic communications. The proposed Joint Guidance sets forth principles for members to consider when developing supervisory systems and procedures for electronic communications that are reasonably designed to achieve compliance with applicable federal securities laws and self-regulatory organization rules.²⁵

The release addressed a wide range of issues concerning electronic communications, and suggested certain minimum standards or best practices for electronic communications review. The Joint Guidance generally is a valuable roadmap for broker-dealers to follow in creating a comprehensive compliance program for electronic communications.

The Joint Guidance stressed, as a threshold matter, the importance of written policies and procedures regulating employees’ use of electronic communications, and recommended that firms issue a “clear list of permissible electronic communication mechanisms (including a clear statement that all other mechanisms are prohibited). For example, if employees are permitted to utilize only the member’s e-mail and instant messaging system, then this should be clearly and unambiguously stated in the member’s policies and procedures.”²⁶

Next, the Joint Guidance addressed compliance concerns raised by the various alternative forms of electronic communications currently available to employees: “Traditionally, members have limited employees’ electronic communications with customers to a member-supplied e-mail address that is connected to the members’ communication network. However, as technology has evolved, employees now have a myriad of ways to communicate electronically with the public.”²⁷ The Joint Guidance made it clear that member firms’ retention and supervisory responsibilities extended to all types of electronic communication media utilized by registered representatives to correspond with customers.²⁸

As illustrative examples, the Joint Guidance identified webmail, and third party communications systems such as Bloomberg and Reuters, as “Non-Member E-Mail Platforms” that could raise compliance concerns for member firms.²⁹ The Joint Guidance then turned its attention to “personal electronic communications devices:”

the SROs expect members to prohibit, through policies and procedures, communications with the public for business purposes from employees’ own electronic devices unless the member is capable of supervising, receiving, and retaining such communications. Absent a prohibition, members should consider requiring pre-approval for the business-related use of any personal electronic communications device. The approval process might require a detailed business justification for using the personal device and an annual re-certification of the approval that includes a re-evaluation of the business justification for its use. In addition, members should consider obtaining agreements from employees authorizing the member to access any such personal electronic communications devices. Members should also consider prohibiting, where appropriate, the use of personal electronic communications devices in certain sensitive firm locations (e.g., where material non-public information could be accessed).³⁰

This above guidance addresses only those devices which are purchased personally by employees for their own purposes. The guidance does not directly mention firm-issued devices, presumably because a firm-issued device is a “permissible electronic communication mechanism” covered by the firm’s written policies and procedures, and/or the communication networks available to employees on their firm-issued devices presumably are approved “mechanisms.”

However, as discussed further below, firms may be unaware that firm-issued devices offer access to electronic communication platforms beyond firm-issued email accounts, such as text messaging, private instant messaging, webmail, and device-to-device messaging. Unlike email sent to and from firm-issued email accounts, electronic communications transmitted through these alternative networks may not be automatically routed to the firm’s email servers for retention and supervisory review. Under the Joint Guidance, these alternative networks are considered “Non-Member E-Mail Platforms,”³¹ and all electronic communications between registered representatives and customers through such platforms must be retained and reviewed by member firms pursuant to the Joint Guidance.

The Joint Guidance should not cause member firms to hesitate to allow their registered representatives to utilize wireless handheld devices for business communication purposes. The Joint Guidance does not impose any heightened retention and review requirements for electronic communications that are made through handheld devices. It simply requires member firms to apply their existing electronic communication compliance policies and procedures to handheld devices, and treat electronic communications made through employees’ handheld devices in the same manner as they treat email and IM communications made through employees’ desktop computers.³²

The Joint Guidance certainly places member firms on formal notice that routine regulatory examinations now will encompass compliance reviews related to handheld devices, and that any findings of material failures to implement and monitor compliance procedures concerning handheld devices will lead to enforcement referrals and disciplinary sanctions.

Compliance Issues Raised By the Joint Guidance

Many member firms may feel confident that they already are in compliance with the Joint Guidance, because firm-issued wireless devices allow their employees only to send and receive email through firm-assigned email addresses residing on the firms' servers ("secure email"). Most member firms utilize compliance software that allows them to journal all emails transmitted through its mail servers to a central storage location for archiving and supervisory review. As such, the Joint Guidance, on its face, would not seem to raise any difficult compliance issues.

However, in addition to secure email, today's handheld wireless devices offer access to alternative electronic communication networks to transmit correspondence that is not automatically routed to the firm's mail server. For instance, many of today's smartphones offer access to electronic communication networks such as SMS/Text Messaging, webmail, proprietary IM applications, access to third party IM applications (such as Yahoo! and GoogleTalk), and device-to-device messaging.³³ These electronic communications either are sent through the device manufacturer's servers only, or via the Internet, or directly from device to device over a wireless network, and are not necessarily captured by or routed to the firms' servers. The Joint Guidance requires member firms to capture and monitor all these alternative forms of electronic communication with customers. Member firms that fail to retain and review such communications are in violation of their regulatory obligations, and are otherwise exposing themselves to unwarranted risk.

Therefore, member firms must quickly get a handle on the electronic communications capabilities of firm-issued handheld devices, and learn to what extent registered persons are communicating with customers through alternative electronic communications networks that are not being captured and reviewed by the firm for compliance purposes. As part of the same exercise, member firms should promptly educate themselves concerning the electronic communications preferences of the firms' customers in today's wireless marketplace. Member firms should not hastily impose an outright prohibition on registered representatives' correspondence with customers via alternative electronic communications networks, because these networks may be customers' preferred method of communication with the firm's representatives. A sudden prohibition against such forms of communications could lead to a loss of business opportunities, competitive advantage, and customer good-will.

As an alternative to prohibition against such communications, firms should consider utilizing commercially available solutions that can bridge the compliance gaps that exist with current handheld devices. Third-party vendors in the compliance arena have developed software that can be installed on employees' handheld devices to capture all electronic communications transmitted through alternative communication networks on the device and wirelessly upload those communications to a member firm's email servers for integration into the firm's existing archiving and supervisory review platforms.³⁴ Member firms should contact device manufacturers to learn about the availability and viability of such compliance software for their devices.

Finally, as discussed above, the Joint Guidance suggested compliance measures that could be taken by member firms to accommodate employees' use of their own personal electronic devices to communicate electronically with customers. The release's suggested pre-approval process on an employee-by-employee, device-by-device, case-by-case basis, with annual re-certifications and re-evaluations in each instance, is at best a haphazard and burdensome solution, and is simply unworkable at any firm with more than a handful of registered representatives.³⁵ In this author's opinion, firms should restrict device-based electronic communications to firm-issued devices only, and prohibit employees' from using their own personal electronic devices for any business communication purpose.

Restricting employees' device communications with customers to firm-issued devices also obviates the need, as suggested by the release, for obtaining employees' authorization to gain access to their personal devices to review communications with customers. Member firms should never put themselves in a position where they are at the mercy of their own employees to gain access to the only internal copy of a critical business communication.

Conclusion

The Joint Guidance was a shot across the bow of any securities firm that has been less than vigilant in ensuring that electronic communications with customers from employees' wireless handheld devices are captured and monitored. At this juncture, member firms cannot blame any further compliance shortcomings related to handheld devices on a lack of guidance from the regulators. The SROs' pronouncement is clear: firms must either be able to capture, retain, and monitor all electronic communications with customers from handheld devices, or must prohibit them.

Compliance and IT departments of member firms should work together to determine whether registered representatives are utilizing electronic communications networks on their wireless devices that are not captured by the firms' mail servers. If so, member firms should determine whether a prohibition against such communications is a viable option in light of today's wireless business environment, or whether they should attempt to correct the problem through the use of commercially available software technology that will capture all such electronic communications and route them to the firms' mail servers for retention, archiving, and supervisory review.

It is refreshing that the SROs continue to encourage member firms to embrace new advances in communication technology for the purpose of conducting their businesses more efficiently and profitably. Member firms must be proactive and stay ahead of the curve with respect to compliance with the recordkeeping and supervisory rules for any and all new electronic communication technologies. In light of the Joint Guidance, member firms should expect that the SROs will deal swiftly and harshly with those firms that fail to take reasonable measures to ensure that electronic communications with customers through handheld devices are preserved and fully subjected to supervisory scrutiny by the firm.

About the Author

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Endnotes

1. Effective July 26, 2007, the regulatory functions of the NYSE and NASD were consolidated into a single SRO called the Financial Industry Regulatory Authority. See SEC Press Release 2007-151 (July 26, 2007).
2. 17 C.F.R. § 240.17a-4(b)(4).
3. See SEC Release No. 34-38245 (Feb. 5, 1997).
4. See SEC Release No. 34-38245. In 1993, when the rule initially was proposed, the SEC's rules required broker-dealers either to retain the original hard copies of their books and records, or retain copies of such records on microfilm or microfiche.
5. The main requirement of the rule was that broker-dealers preserve the records exclusively in a "non-rewritable, non-erasable" electronic media format. See 17 C.F.R. § 240.17a-4(f)(2)(ii)(A). The SEC stated that an electronic storage medium would be acceptable only if it allowed for digital data recording in a non-rewritable, non-erasable format such as "write once, read many" ("WORM"). Pursuant to the release, acceptable electronic storage media included optical disk, optical tape, and CD-ROM. See SEC Release No. 34-38245. Among the other requirements of Rule 17a-4(f) are that the electronic storage system must verify automatically the quality and accuracy of the recording process; serialize the original, and if applicable, duplicate units of storage media, and time-date the information for the required period of retention; readily download indexes and records preserved on the electronic storage media to an acceptable medium for the regulators; store, separately from the original, a duplicate copy of the record stored on any medium acceptable under the rule; organize and index accurately all information maintained on both the original and any duplicate storage media; have in place an audit system providing for accountability regarding inputting of records preserved to electronic storage media and inputting of any changes made to every original and duplicate record preserved.
6. The rule was not designed with email in mind. The rule originally was proposed in 1993, see Reporting Requirements for Brokers or Dealers under the Securities Exchange Act of 1934, SEC Release No. 34-32609 (July 9, 1993), at or around the time that email first gained widespread popularity.
7. Not surprisingly, the SEC immediately received "push-back" from the securities industry regarding the 1997 Release's requirement that all business emails be retained. The SEC's Division of Market Regulation commenced discussions with the industry with a view towards possibly paring back the broad requirements imposed by the 1997 Release. Pending the outcome of those discussions, many major Wall Street firms did not undertake any serious efforts to comply with the 1997 Release. See *In re Raymond James Financial Services, Inc.*, Initial Decision Release No. 296 (Sept. 15, 2005) at 49, 70. By approximately 2000, the SEC's Division of Market Regulation instructed the NYSE's Division of Member Firm Regulation to withhold making any enforcement referrals based on email record retention deficiencies, and to withdraw any referrals previously made to the NYSE's enforcement division concerning email retention. See *id.* at 49 -50, 70.

A proposal to relax the email rules was privately circulated among the regulators in or about 2002, but the SEC staff ultimately did not recommend the proposal. Apparently, the SEC staff changed its course and started taking a more aggressive approach with respect to email retention after then-New York Attorney General Elliot Spitzer garnered headlines by aggressively pursuing Wall Street firms for analysts' conflicts of interest based on "smoking gun" emails. See *id.* at 49-50. Starting in late 2002, the SEC brought a slew of enforcement cases against broker-dealers for failure to produce emails that originally had been stored on backup tapes (because the tapes could not be located, were damaged, could not be restored, or were erased), but did not charge any of the broker-dealers in those cases for failing to properly preserve the emails under SEC Rule 17a-4(f) because the emails in question concerned the time period 1999 - 2002. See *SEC v. Morgan Stanley & Co., Inc.*, Litigation Release No. 19693 (May 10, 2006); *In re J.P. Morgan Securities, Inc.*, SEC Release No. 34-51200 (Feb. 14, 2005); *In re Robertson Stephens, Inc.*, SEC Release No. 34-47144 (Jan. 9, 2003); *In re Deutsche Bank Securities, Inc., et al.*, SEC Release No. 34-46937 (Dec. 3, 2002).

Since the time the SEC withdrew its moratorium on SRO disciplinary actions related to email retention, the SROs have been busy bringing cases for violations of 17a-4(f). See, e.g., *In re Hampton Securities (USA), Inc.*, NASD NTM Disciplinary Actions, December 2006, at 3 (the firm did not maintain and preserve electronic communications as required by 17a-4, in that it utilized an electronic back-up system to capture and retain emails but recycled the back up tapes each week, overwriting them with new data); *In re Prudential Equity Group, LLC*, NYSE Hearing Panel Decision No. 06-24 (April 18, 2006) (emails sent from customers to registered representatives through the firm's website were not saved in WORM format as required by Rule 17a-4(f)); *In re Charles Schwab & Co., Inc.*, Exchange Hearing Panel Decision No. 05-110 (October 17, 2005) (the firm failed to maintain records in required WORM format under 17a-4(f)); *In re Peregrine Financials & Securities, Inc.*, NASD Disciplinary Actions, May 2004, at D2 (the firm failed to maintain a "preservation system to store electronic mail communications records in a non-rewritable, non-erasable manner for the required time period as required by SEC Rule 17a-4(f)"). See also NASD, *Improving Examination Results*, May 2007, available at www.nasd.com ("The most frequent violations found during routine examination include failure to . . . stor[e] records in a manner inconsistent with . . . rule [17a-4(f)] specifications. For example, firms should not store electronic communications (i.e., email or instant messages) exclusively on a computer's hard drive or on the firm's network server").

8. See NASD Rule 3010(d); NYSE Rule 342.16. These SRO rules do not require that broker-dealers review internal emails among their employees. See SEC Release No. 34-38548 (Apr. 25, 1997).
9. See NASD Rule 3010(d)(2); NYSE Rule 342.17. Several firms have run afoul of the requirements to implement and monitor supervisory procedures for review of email. See, e.g., *In re Fleet Securities, Inc.*, NYSE Hearing Panel Decision No. 06-40 (May 10, 2006) (while the firm had systems and procedures in place for the post-use review of email, the firm failed to properly implement those procedures in that it failed to designate a supervisor with responsibility for reviewing representatives' email communications with the public); *In re The Seidler Companies, Inc.*, Exchange Hearing Panel Decision No. 04-136 (Aug. 11, 2004) ("review of email was not being conducted by a qualified, registered and approved person . . ."). See also *In re Bear, Stearns & Co., Inc.*, SEC Release No. 34-54806 (Nov. 21, 2006) (the SEC brought "failure to supervise" charges against the firm based on its failure to effectively implement email review policies and procedures that would have prevented and detected its salespersons' misconduct).
10. See NASD NTM 98-11; NYSE Info. Memo 98-3. The SROs have brought numerous actions based on firms' failure to retain emails transmitted via outside email systems. See *In re Pension Fund Evaluations, Inc.*, NASD NTM Disciplinary Actions, July 2007, at 2 -3 (firm did not have a system to retain business emails that a registered principal sent or received using his personal email account, and failed to preserve copies of such emails); *In re Legend Equities Corp.*, NASD NTM Disciplinary Actions, July 2007, at 7 (firm failed to maintain and preserve emails by registered representatives who were using external email accounts); *In re Bathgate Capital Partners LLC*, NASD NTM Disciplinary Actions, June 2007, at 2 (firm failed to capture, retain and preserve emails of registered representative sent and received using his "own email provider"); *In re Morgan Stanley & Co. Inc.*, NYSE Hearing Board Decisions 07-66 (May 9, 2007) (branch office failed to produce evidence that it reviewed and maintained email communications sent and received by one registered representative from his personal laptop computer).
11. See NASD NTM 98-11 and NYSE Info. Memo 98-3 (both the NASD and the NYSE stated that their "examiners periodically will review member organizations' procedures and systems to ensure that they are reasonable in view of each firm's structure, and the nature and size of its business and customer base."). The SROs have brought numerous disciplinary actions based on sampling problems. See *In re Morgan Stanley & Co., Inc.*, NYSE Hearing Board Decision 07-66 (May 9, 2007) (three branch offices failed to produce evidence that a sampling of employees' emails was being reviewed during the 2005 review period); *In re Stifel, Nicolaus & Co. Inc.*, NYSE Hearing Board Decision 06-178 (Sept. 26, 2006) ("While the Firm did have an email filtering system that captured email containing certain key words and was reviewing the captured email, until July 2004, the Firm was not reviewing a representative sampling of other email"); *In re Daiwa Securities America Inc.*, NYSE Hearing Board Decision 06-137 (July 10, 2006) (the firm's policies and procedures did not state whether the 10% sampling review should be measured on a daily weekly or monthly basis, and the firm's compliance department reports did not reflect enough information to determine whether the supervisors were adequately completing email reviews); *In re Piper Jaffray & Co.*, Exchange Hearing Panel Decision 04-180 (Nov. 23, 2004) (sampling procedures did not ensure that a sample of each registered representative's incoming messages was reviewed, and certain branch offices of firm failed to provide evidence of supervisory review of attachments to emails messages.).
12. See NYSE Info. Memo 03-7 (March 5, 2003) ("instant messages, . . . must be maintained and retained in compliance with" the SEC's record retention rules). See also NASD NTM 03-33 (July 2003). According to the NASD, some brokerage firms had banned IM with customers, because consumer versions of IM did not allow them to retain and properly review instant messages. Other firms allowed use of IM with customers, without compliance with the regulations applicable to email, because they believed "instant messaging is less formal than email and paper-based communication and need not be subject to the same requirements." The NASD stated that "lack of formality of instant messaging does not exempt it from the general standards applicable to all forms of communication with the public." *Id.* The NASD warned the brokerage community that: "Messages exchanged on many popular instant messaging platforms cannot be saved or subsequently retrieved, making them inappropriate for communications that must be retained as firm records. Members that permit instant messaging must use a platform that enables the member to monitor, archive, and retrieve message traffic." *Id.*
13. The SEC has been virtually silent on the use of personal electronic communication devices by employees of broker-dealers for business purposes. The one exception is Congressional testimony provided by the SEC's Director of Office of Compliance Inspections and Examinations in 2002, concerning an enforcement case involving a registered representative who stole at least \$40 million from more than fifty clients while working for various broker-dealers. At the end of the testimony, the SEC Director identified certain best practices used by many brokerage firms that could serve to detect and prevent misappropriations of customer funds or securities, and basically previewed the joint guidance issued five years later by the NASD and NYSE in the Joint Guidance:

Supervise Employees' Use of Personal Electronic Devices.

Firms prohibit either employees' use of personal electronic devices (personal computers, blackberries) to conduct firm business or carefully monitor their use. Firms require that use of personal electronic devices be pre-approved and that they be linked with the firm's system to allow for supervisory review, or that data be periodically downloaded to the firm's system for review, or that a manager periodically review the contents of the electronic device.

Testimony Concerning Issues Raised by the Frank D. Gruttadauria Matter, Lori A. Richard, Director, Office of Compliance Inspections and Examinations of the SEC, before the Subcommittee on Oversight and Investigation, Financial Services, Committee, U.S. House of Representatives (May 23, 2002), available at <http://www.sec.gov/news/testimony/052302tslar.htm>.

14. NYSE Rule 36 currently provides that “No member or member organization shall establish or maintain any telephonic or electronic communication between the Floor and any other location without the approval of the Exchange”
15. An example of an Exchange-approved handheld wireless communication device for use on the Exchange floor is the “NYSE e-Broker” wireless device. This device, approved by the SEC pursuant to the Exchange’s Wireless Data System program, allows floor brokers to electronically communicate with booth terminals and other floor brokers. See SEC Release No. 34-39379 (Dec. 1, 1997). The e-Broker device is several times larger than a standard Smartphone, has a touch screen but lacks voice communication functionality. In 2003, the SEC approved amendments to NYSE Rule 36 to permit the use of Exchange authorized and issued portable telephones on the floor for off-floor “direct voice communication” only. See NYSE Info. Memo. No. 03-18 (May 6, 2003).
16. NYSE Market Surveillance Division Member Education Bulletin #2003-4 (May 15, 2003) (emphasis in original).
17. See Form 19b-4 Proposed Rule Change by New York Stock Exchange, Inc., SR-NYSE-2004-08 (Feb. 13, 2004).
18. Id. at note 10. Further, pursuant to the rule proposal, “specialists and their employees on the Floor will be permitted to use one-way text pagers that have been programmed to allow them only to receive incoming text messages originating from within the specialist firm, with no functionality on the device to send outgoing messages or respond to messages received.” Id.
19. See id. at 5.
20. See NYSE Weekly Bulletin, November 5, 2004, at 6.
21. NYSE Market Surveillance Division Member Education Bulletin 2005-6 (April 28, 2005).
22. Id.
23. See NYSE Info Mem. No. 07-43 (May 9, 2007).
24. NASD NTM 07-30 (June 2007) (“Joint Guidance”); NYSE Info. Memo 07-54 (June 14, 2007). The comment period expired July 13, 2007.
25. Joint Guidance at 1.
26. Id. at 5 (parenthesis in original).
27. Id. at 6.
28. See id.
29. The Joint Guidance stated particularly:

Employees have the ability to communicate via email through means other than their member-issued email address by accessing email platforms through the Internet (e.g., through AOL or Yahoo mail) and through third-party communication systems such as Bloomberg and Reuters. If a member permits employees to communicate with customers through these systems or through non-member email addresses, the member is required to supervise and retain those communications. Some members prohibit, through policies and procedures, employees from accessing non-member email platforms for business purposes, and require employees to certify on an annual or more frequent basis that they are acting consistent with such policies and procedures. Where possible, some members have chosen to block access to these email platforms through their networks. Thus, an employee would be able to access the Internet but not the email functionality. Members utilizing this blocking functionality should periodically conduct tests to ensure that it is functioning as designed or intended.

Joint Guidance at 6.

30. Id. The SROs received a total of fifteen comment letters in response to the release. The Securities Industry and Financial Markets Association, the trade association for the brokerage, asset management, and banking industries, and the Investment Company Institute, the trade association for the mutual fund industry, both supported the joint guidance. See <http://www.finra.org/RulesRegulation/NoticestoMembers/CommentsonNotice/P019297>.

31. The first footnote to the Joint Guidance states: “For purposes of this Joint Guidance, ‘electronic communications,’ ‘e-mail,’ and ‘electronic correspondence’ may be used interchangeably and can include such forms of electronic communications as instant messaging and text messaging.” Joint Guidance at 12 n.1.

32. The Investment Company Institute, in its comment letter on the Joint Guidance, recommended that the SROs:

clarify that the guidance is not intended to expand members’ existing obligations to supervise communications – regardless of medium. Instead, the guidance is intended to assist members in supervising, consistent with existing regulatory requirements, the variety of electronic communication devices used by members and their associated persons. A statement along these lines will ensure that the guidance is not misinterpreted to impose upon members obligations beyond those currently imposed through NASD Rule 3010 and other supervisory rules, some of which are expressly mentioned in the guidance.

Letter from Tamara K. Salmon, Investment Company Institute, to Barbara Z. Sweeney, NASD, Re: Proposed Guidance on Supervision of Electronic Communications: NASD Notice to Members 07-30, at 2 (July 12, 2007), available at http://www.finra.org/web/groups/rules_regs/documents/notice_to_members/p019420.pdf.

33. For instance, each BlackBerry device has a unique PIN, or personal identification number. BlackBerry users who know each others’ PIN can communicate directly, device to device, over the wireless network, and can bypass their employers’ servers. PIN to PIN messaging was designed to allow BlackBerry users to communicate directly in the event of a catastrophic loss of network, email, or back-end infrastructure.

34. See, e.g., Carol Curtis, *The BlackBerry: On the Air and Off the Record*, Securities Industry News (June 13, 2005). As later discussed, this author discourages broker-dealers from allowing their registered representatives to communicate electronically with customers through their own personal wireless devices. However, if a brokerage firm wishes to allow such practice, it should ensure that the aforementioned software is installed on each employees’ personal device, so that such communications automatically are routed to the firm’s servers for retention and review.

35. On the other hand, where a firm is considering issuing a specific handheld device to employees on a firm-wide basis, it makes perfect sense for the Compliance and IT departments of the firm should scrutinize and pre-approve such proposed device for securities compliance purposes.