

I. *The J.P. Morgan Scandal and What It Means for the Future of Corporate Recordkeeping*

A. Introduction

On December 17, 2021, the U.S. Securities and Exchange Commission (SEC) and the U.S. Commodity Futures Trading Commission (CFTC) separately announced charges against J.P. Morgan Securities LLC (J.P. Morgan or the firm), a broker-dealer subsidiary of JPMorgan Chase & Co., for widespread and longstanding failures to abide by the recordkeeping requirements of both the Securities Exchange Act of 1934 (1934 Act) and the Commodity Exchange Act.¹ Both SEC and CFTC staff discovered that, for almost three years, J.P. Morgan employees regularly used personal devices and third-party apps to communicate about securities-related business matters;² further, the firm had not been collecting or retaining these written communications, as required by federal securities laws.³ In admitting to the SEC's and CFTC's factual findings and conclusions, J.P. Morgan paid a total of \$200 million in fines, including \$125 million to the SEC and \$75 million to the CFTC.⁴

¹ See *In re J.P. Morgan Sec. LLC* Release No. 93807, 2021 WL 5986789 (Dec. 17, 2021) (“The Securities and Exchange Commission (‘Commission’) deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 (‘Exchange Act’) against J.P. Morgan Securities LLC (‘Respondent’ or ‘JPMorgan’); see also *In re JPMorgan Chase Bank, N.A., J.P. Morgan Sec. LLC, and J.P. Morgan Sec. plc*, CFTC No. 22-07, 2021 WL 6098347 (Dec. 17, 2021) (“Therefore, the Commission deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted to determine whether Respondents engaged in the violations set forth herein and to determine whether any order should be issued imposing remedial sanctions.”).

² See *id.* (detailing that unapproved messages were sent over “personal devices” on personal apps such as WhatsApp).

³ Press Release, SEC, JPMorgan Admits to Widespread Recordkeeping Failures and Agrees to Pay \$125 Million Penalty to Resolve SEC Charges (Dec. 17, 2021) (on file with author) (pressing the reality of how established these SEC rules are, dating back to the 1930s).

⁴ Dean Seal, *JPMorgan Fined \$200M For Not Retaining Staff's Texts, Emails*, LAW360 (Dec. 17, 2021), <https://www-law360-com.ezproxy.bu.edu/articles/1449792/jpmorgan-fined-200m-for-not-retaining-staff-s-texts-emails> (breaking down the various payments the firm has to make for its institutional failure).

The SEC’s and CFTC’s charges against J.P. Morgan represent the latest move in an “ongoing battle between regulators, banks and employees over the use of personal devices” for work-related communications.⁵ The COVID-19 pandemic (Pandemic) only intensified this battle when it forced the abrupt closure of many offices and introduced a new era of remote work for millions of Americans.⁶ The SEC’s inspections unit even issued an industry-wide alert that urged firms to consider enhancing their oversight procedures with so many employees working off-site.⁷

The first part of this article engages in a factual and legal discussion of the SEC’s and CFTC’s enforcement actions against J.P. Morgan. It then leverages this discussion to assess the enforcement action’s broader implications for the broker-dealer industry. The article concludes with a discussion of how companies can best structure their compliance functions to monitor employee communications and prevent similar disclosure violations.

B. Relevant Broker-Dealer Recordkeeping Requirements

The enactment of the federal securities laws “was spurred by the stock market crash of 1929, and the resulting Great Depression.”⁸

⁵ Thomas Franck & Hugh Son, *JPMorgan hit with \$200 million in fines for letting employees use WhatsApp to evade regulators’ reach*, CNBC (Dec. 17, 2021), <https://www.cnbc.com/2021/12/17/jpmorgan-agrees-to-125-million-fine-for-letting-employees-use-whatsapp-to-evade-regulators.html> (“The move is the latest sign of an ongoing battle between regulators, banks and employees over the use of personal devices.”).

⁶ Kim Parker et al., *How the Coronavirus Outbreak Has – and Hasn’t – Changed the Way Americans Work*, PEW RSCH. CTR. (Dec. 9, 2020), <https://www.pewresearch.org/social-trends/2020/12/09/how-the-coronavirus-outbreak-has-and-hasnt-changed-the-way-americans-work/> (“The abrupt closure of many offices and workplaces this past spring ushered in a new era of remote work for millions of employed Americans.”).

⁷ Dan Ennis, *Banks’ pandemic-era flexibility reaches its pivot point*, BANKING DIVE (June 14, 2021), <https://www.bankingdive.com/news/banks-pandemic-era-flexibility-reaches-its-pivot-point/601761/> (“The Securities and Exchange Commission’s inspections unit, for example, issued an alert prodding companies to consider strengthening their record-keeping efforts.”).

⁸ *Securities law history*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/securities_law_history (“The development

Leading up to the crash, public companies regularly promoted their value to induce investors to purchase their stocks.⁹ Brokers sold these stocks “to investors based on promises of large profits,” when in reality the promises of these companies and brokers “had little or no substantive basis, or were wholly fraudulent.”¹⁰ By the time the crash of 1929 was at its precipice, the stock “market was in a state of speculative frenzy.”¹¹ As panicky investors simultaneously sold off their investments, the market crashed.¹² In one day, investors and banks lost billions of dollars.¹³ The crash caused nearly 5,000 banks to close and led to rampant bankruptcies, unemployment, and homelessness.¹⁴

In response to the 1929 crash, Congress enacted laws to prevent similar speculative frenzies from occurring in the future.¹⁵ Generally speaking, these laws aim to provide investors with financial and other significant information concerning securities.¹⁶ They do so, in large part, by forcing companies that sell securities in the United States to file

of federal securities law was spurred by the stock market crash of 1929, and the resulting Great Depression.”).

⁹ *Id.* (“In the period leading up to the stock market crash, companies issued stock and enthusiastically promoted the value of their company to induce investors to purchase those securities.”).

¹⁰ *Id.* (“Brokers in turn sold this stock to investors based on promises of large profits but with little disclosure of relevant information about the company. In many cases, the promises made by companies and brokers had little or no substantive basis, or were wholly fraudulent.”).

¹¹ *Id.* (“With thousands of investors buying up stock in hopes of huge profits, the market was in a state of speculative frenzy...”).

¹² *Id.* (“[T]he market crashed as panicky investors sold off their investments en masse”).

¹³ *SEC: Securities and Exchange Commission, HISTORY* (2019), <https://www.history.com/topics/us-government/securities-and-exchange-commission> (“[I]nvestors and banks lost billions of dollars in just one day.”).

¹⁴ *Id.* (“But on October 29, 1929 — “Black Tuesday” — the stock market crashed . . . caus[ing] nearly 5,000 banks to close and led to bankruptcies, rampant unemployment, wage cuts and homelessness which triggered the Great Depression.”).

¹⁵ *Securities law history, supra* note 8 (“In response to this calamity and at President Franklin Roosevelt’s instigation, Congress enacted laws to prevent speculative frenzies like those in the 1920s.”).

¹⁶ *The Laws that Govern the Securities Industry*, U.S. SEC. EXCH. COMM’N, <https://www.investor.gov/introduction-investing/investing-basics/role-sec/laws-govern-securities-industry#secexact1934> (describing how these laws help achieve the goals of the SEC — to inform investors).

periodic reports and disclose other types of important information to investors and the general public.¹⁷ These disclosures allow “investors . . . to make informed judgments about whether to purchase a company’s securities.”¹⁸

One of these laws is the Securities Exchange Act of 1934.¹⁹ The 1934 Act created the SEC and authorized it to govern and regulate transactions of securities in the secondary market, “such as trades that retail investors execute through brokerage companies.”²⁰ The SEC has broad authority over all aspects of the securities industry, including the power to regulate brokerage firms and self-regulatory organizations like the New York Stock Exchange.²¹

Not only does the 1934 Act give “the SEC broad powers to enforce U.S. federal securities law,” but it also empowers the SEC to “investigate potential violations such as insider trading . . . manipulation of market prices and disclosure of fraudulent financial information.”²² For example, Section 17(a)(1) of the 1934 Act gives the SEC the authority “to issue rules requiring broker-dealers to make and keep . . . such records as necessary . . . for the protection of investors.”²³ To support its investigative endeavors, the SEC adopted Rule 17a-4

¹⁷ *Securities Exchange Act of 1934*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/securities_exchange_act_of_1934 (specifying that these periodic reports help investors stay informed).

¹⁸ *The Laws that Govern the Securities Industry*, *supra* note 16 (“This information enables investors, not the government, to make informed judgments about whether to purchase a company’s securities.”).

¹⁹ *Securities Exchange Act of 1934*, *supra* note 17 (confirming this fact).

²⁰ *Securities Exchange Act of 1934*, *supra* note 17 (The Act “primarily regulates transactions of securities in the secondary market. As such, the 1934 Act typically governs transactions which take place between parties which are not the original issuer, such as trades that retail investors execute through brokerage companies.”).

²¹ *Id.* (explaining the institutions which the Act covers).

²² *Securities Exchange Act of 1934*, TOPPAN MERRILL, <https://www.toppanmerrill.com/glossary/securities-exchange-act-of-1934/> (“The Exchange Act of 1934 gives the SEC broad powers to enforce US federal securities law, but also investigate potential violations such as insider trading, the sale of unregistered stocks, manipulation of market prices and disclosure of fraudulent financial information.”).

²³ *In re J.P. Morgan Sec. LLC* Release No. 93807, 2021 WL 5986789 (Dec. 17, 2021) (“Section 17(a)(1) of the Exchange Act authorizes the Commission to issue rules requiring broker-dealers to make and keep for prescribed periods, and furnish copies of, such records as necessary or appropriate in the public interest, for the protection of investors.”).

pursuant to its authority under Section 17(a)(1).²⁴ Rule 17a-4 requires broker-dealers to create and preserve originals of all communications received and sent relating to the firm's business for at least three years.²⁵ In addition, Rule 17a-4 requires that firms provide the SEC with all such records upon request.²⁶

The SEC has stressed that these strict recordkeeping requirements are integral to protecting investors, as preserved records are the primary way the SEC monitors firms' compliance with securities laws.²⁷ Requiring broker-dealers to create and maintain certain records allows the SEC and other securities regulators to conduct effective examinations of broker-dealers.²⁸ As a result, strict record-keeping requirements help maintain the legitimacy of the broker-dealer industry, protect investors, and prevent fraud.²⁹

Similarly, the Commodity Exchange Act (CEA) was passed in 1936 to regulate the trading of commodity futures in the United States.³⁰ The CEA created the CFTC, which aims to protect "the public from fraud, manipulation, and other abusive practices" surrounding "the sale

²⁴ *Id.* (explaining how Rule 17a-4 deal more with procedural detail requirements under the 17(a)(1) section of the Exchange Act such as the time period for companies to hold records).

²⁵ *Id.* ("require broker-dealers to preserve for at least three years originals of all communications received and copies of all communications sent relating to its business as such...").

²⁶ *Id.* ("furnish such records promptly to a Commission representative upon such representative's request.").

²⁷ Commission Guidance to Broker-Dealers on the Use of Electronic Storage Media under the Electronic Signatures in Global and National Commerce Act of 2000 with Respect to Rule 17a-4(f), Exchange Act Rel. No. 44238, 17 C.F.R. Part 241 (May 1, 2001) (explaining the SEC's thought process on justification for preserving communications).

²⁸ *Books and Records*, FINRA, <https://www.finra.org/rules-guidance/key-topics/books-records> ("The SEC requires that broker-dealers create and maintain certain records so that, among other things, the SEC, self-regulatory organizations ("SROs") and state securities regulators may conduct effective examinations of broker-dealers.").

²⁹ Ernest E. Badway et. al., *Broker-Dealer Recordkeeping Requirements*, FOX ROTHSCHILD LLP (2017), <https://www.foxrothschild.com/content/uploads/2017/09/Practical-Compliance-Risk-Management-2.pdf> (noting the importance of record-keeping to the industry's stability).

³⁰ *Commodity Exchange Act & Regulations*, CFTC, <https://www.cftc.gov/LawRegulation/CommodityExchangeAct/index.htm> (confirming this fact).

of commodity and financial futures and options.”³¹ Similarly to 1934 Act, the CEA creates, and the CFTC imposes, recordkeeping and supervision requirements on CFTC registrants, including swap dealers.³² Section 4s(f)(1)(C) of the CEA requires swap dealers to keep accurate books and records of all activities related to its business, including records of daily trading and counterparty records.³³ These sections are implemented, among other places, at Regulations 23.201(a)(1), 23.202(a)(1), and 23.202(b)(1).³⁴ These regulations require every swap dealer to keep daily records of all oral and written communications provided or received concerning various aspects of swap transactions.³⁵

C. Case Study: J.P. Morgan Securities, LLC

On December 17, 2021, the SEC and the CFTC separately announced charges against J.P. Morgan for widespread and longstanding failures to abide by the recordkeeping requirements of the 1934 Act, the CEA, and CFTC Regulations (Regulations, collectively Federal Securities Regulations).³⁶ The underlying facts of both charges are largely the same.³⁷ As described in the SEC’s order, J.P. Morgan

³¹ *U.S. Commodity Futures Trading Commission*, USAGov, <https://www.usa.gov/federal-agencies/u-s-commodity-futures-trading-commission> (“The Commodity Futures Trading Commission protects the public from fraud, manipulation, and abusive practices related to the sale of commodity and financial futures and options, and to fosters open, competitive, and financially sound futures and option markets.”).

³² *In re JPMorgan Chase Bank, N.A., J.P. Morgan Sec. LLC, and J.P. Morgan Sec. plc*, CFTC No. 22-07, 2021 WL 6098347 (Dec. 17, 2021) (“The Act and Regulations impose recordkeeping and supervision requirements on Commission registrants to ensure that they responsibly discharge their crucial role in our markets.”).

³³ *Id.* (“Section 4s(f)(1)(C) of the Act obligates swap dealers to keep “books and records of all activities related to its business as a swap dealer...”).

³⁴ *Id.* (confirming this fact).

³⁵ *Id.* (“requiring swap dealers to keep daily trading and counterparty records”).

³⁶ *See In re J.P. Morgan Sec. LLC* Release No. 93807, 2021 WL 5986789 (Dec. 17, 2021) (stating that the SEC is bringing charges against J.P. Morgan); *see also In re JPMorgan Chase Bank, N.A., J.P. Morgan Sec. LLC, and J.P. Morgan Sec. plc*, CFTC No. 22-07, 2021 WL 6098347 (Dec. 17, 2021) (stating that the CFTC is bringing charges against J.P. Morgan).

³⁷ *Id.* (both organizations detailing that J.P. Morgan employees and executive officers repeatedly used third-party personal messaging apps for work-related securities matters).

admitted that from at least January 2018 through November 2020, the firm's employees often used personal devices, personal email accounts, and third-party apps to communicate about securities-related business matters.³⁸ Thousands of unauthorized communications involved discussions between senior-level J.P. Morgan executives, employees, clients, and other market participants.³⁹ None of these records were preserved by the firm and many could not be provided to the SEC and CFTC when requested, in violation of Federal Securities Regulations.⁴⁰ The firm's actions also violated its own internal compliance policies, which prohibited such communications.⁴¹ J.P. Morgan further admitted that these practices were not hidden from the firm.⁴² Managing directors and senior supervisors, the very folks responsible for ensuring compliance with J.P. Morgan's policies and procedures, knew about the widespread behavior and went so far as to use their own personal devices to communicate about the firm's business activities.⁴³

SEC and CFTC staff uncovered the violations after third parties turned over communications with J.P. Morgan employees that the firm itself had not produced in response to separate SEC and CFTC

³⁸ *In re J.P. Morgan Sec. LLC* Release No. 93807, 2021 WL 5986789 (Dec. 17, 2021) ("From at least January 2018 through at least November 2020, JPMorgan employees often communicated about securities business matters on their personal devices, using text messaging applications (including WhatsApp) and personal email accounts.").

³⁹ *Id.* ("[W]ritten communications were sent and received by JPMorgan employees and included messages related to the securities business of the broker-dealer operated by JPMorgan.").

⁴⁰ *Id.* (describing the complete lack of ability for J.P. Morgan to provide records of out of work communications about securities).

⁴¹ *Id.* ("[D]ozens of managing directors across the firm and senior supervisors responsible for implementing JPMorgan's policies and procedures... failed to comply with firm policies by communicating using non-firm approved methods on their personal devices about the firm's securities business.").

⁴² *Id.* ("[T]his widespread practice was not hidden within the firm. To the contrary, supervisors - i.e., the very people responsible for supervising employees to prevent this misconduct - routinely communicated using their personal devices.").

⁴³ *Id.* ("In fact, dozens of managing directors across the firm and senior supervisors responsible for implementing JPMorgan's policies and procedures, and for overseeing employees' compliance with those policies and procedures, themselves failed to comply with firm policies by communicating using non-firm approved methods on their personal devices about the firm's securities business.").

investigations.⁴⁴ After being questioned, J.P. Morgan’s attorneys confirmed that the firm had not been collecting or retaining written communications created on its employees’ personal devices.⁴⁵ Although J.P. Morgan was able to start producing relevant text messages and other communications, it admitted to the SEC and CFTC that certain securities-related communications had been deleted and could not be recovered.⁴⁶ These violations left regulators completely blind to “thousands of business-related communications in connection with its commodities and swaps businesses.”⁴⁷ The SEC states explicitly that J.P. Morgan’s failure to preserve and produce these communications to the SEC compromised and delayed various SEC investigations.⁴⁸

As a result of the conduct described above, the SEC found that J.P. Morgan willfully violated Section 17(a) of the 1934 Act, as well as SEC Rules 17a-4(b)(4) and 17a-4(j).⁴⁹ Because senior-level associates and executives at J.P. Morgan were aware of the issue, the SEC found that the firm also violated Section 15(b)(4)(e) of the 1934 Act, which allows the SEC to impose penalties on a broker-dealer that fails to

⁴⁴ See *In re J.P. Morgan Sec. LLC* Release No. 93807, 2021 WL 5986789 (Dec. 17, 2021) (describing the actions the SEC had to take in order to obtain text messages that J.P. Morgan did not turn over, knowing the messages were on personal devices); see also *In re JPMorgan Chase Bank, N.A., J.P. Morgan Sec. LLC, and J.P. Morgan Sec. plc*, CFTC No. 22-07, 2021 WL 6098347 (Dec. 17, 2021) (characterizing the actions the CFTC had to take in order to obtain text messages that J.P. Morgan did not produce, knowing the messages were on personal devices).

⁴⁵ *In re J.P. Morgan Sec. LLC* Release No. 93807, 2021 WL 5986789 (Dec. 17, 2021) (“When questioned by Commission staff, counsel to JPMorgan confirmed that the firm had not collected or produced any text messages sent or received through unapproved communications methods on personal devices.”).

⁴⁶ *Id.* (noting the relevancy of the messages and the people on either side of them that could not be recovered).

⁴⁷ See *In re J.P. Morgan Sec. LLC* Release No. 93807, 2021 WL 5986789 (Dec. 17, 2021) (specifying the inadequacy of the information J.P. Morgan could provide); see also *In re JPMorgan Chase Bank, N.A., J.P. Morgan Sec. LLC, and J.P. Morgan Sec. plc*, CFTC No. 22-07, 2021 WL 6098347 (Dec. 17, 2021) (“JPMorgan failed to maintain thousands of business-related communications in connection with its commodities and swaps businesses...”).

⁴⁸ *In re J.P. Morgan Sec. LLC* Release No. 93807, 2021 WL 5986789 (Dec. 17, 2021) (discussing the utter lack of preservation by the firm and the negative effect that had on the SEC’s ability to follow through).

⁴⁹ *Id.* (“As a result, JPMorgan violated Section 17(a) of the Exchange Act and Rules 17a-4(b)(4) and 17a-4(j) thereunder.”).

reasonably supervise its employees in order to detect and prevent violations of the Federal Securities laws.⁵⁰

Similarly, the CFTC found that J.P. Morgan violated the following sections of the CEA: 4s(f)(1)(C), 4s(f)(1)(C), 4s(g)(1), (3), 4g, and 4s(h)(1)(b).⁵¹ In turn, the firm's actions violated the following Regulations: 23.201(a)(1), 23.202(a)(1), 23.202(b)(1), 1.35, 1.31, 23.602(a), and 166.3.⁵²

In admitting to the SEC's and CFTC's factual findings and conclusions, J.P. Morgan was ordered to pay \$125 million in fines to the SEC and \$75 million in fines to the CFTC.⁵³ This constitutes the "largest [SEC] record-keeping fine to date."⁵⁴ As part of its settlement with the SEC and CFTC, J.P. Morgan also agreed to a series of remedial measures.⁵⁵ The firm agreed to retain an independent compliance consultant to, among other things, conduct a comprehensive review of the firm's policies and procedures relating to the preservation of electronic communications found on employees' personal devices.⁵⁶

⁵⁰ *Id.* ("JPMorgan failed reasonably to supervise its employees with a view to preventing or detecting certain of its employees' aiding and abetting violations of the federal securities laws, within the meaning of Section 15(b)(4)(E) of the Exchange Act.").

⁵¹ *In re JPMorgan Chase Bank, N.A., J.P. Morgan Sec. LLC, and J.P. Morgan Sec. plc*, CFTC No. 22-07, 2021 WL 6098347 (Dec. 17, 2021) ("JPMorgan violated, as set forth below, Sections 4g, 4s(f)(1)(C) and 4s(g)(1) and (3) of the Act").

⁵² *Id.* (The firm also violated "Regulations 1.31, 1.35, 23.201, and 23.202(a)(1) and (b)(1).").

⁵³ Franck & Son, *supra* note 5 ("JPMorgan Securities agreed to pay \$125 million after admitting to "widespread" record-keeping failures in recent years. The Commodity Futures Trading Commission also said Friday that it had fined the bank \$75 million for allowing unapproved communications since at least 2015.").

⁵⁴ *Id.* ("SEC officials said the \$125 million penalty is its largest record-keeping fine to date").

⁵⁵ *See In re J.P. Morgan Sec. LLC* Release No. 93807, 2021 WL 5986789 (Dec. 17, 2021) (detailing the various remedial steps the firm will take, including hiring a compliance consultant and regularly reviewing recordkeeping practices); *see also In re JPMorgan Chase Bank, N.A., J.P. Morgan Sec. LLC, and J.P. Morgan Sec. plc*, CFTC No. 22-07, 2021 WL 6098347 (Dec. 17, 2021) (noting in the settlement offer that the firm must represent "that it has engaged in a review of certain recordkeeping failures and begun a program of remediation.").

⁵⁶ Seal, *supra* note 4 ("JPMorgan has admitted to both the SEC and the CFTC's findings and has agreed to pay a combined \$200 million to the market regulators and to retain a compliance consultant that will help the

The consultant is also tasked with reviewing the trainings that J.P. Morgan conducts to ensure that personnel are complying with the requirements.⁵⁷ The compliance consultant will also assess the surveillance programs and technological solutions that the firm implements to ensure that it complies with recordkeeping requirements.⁵⁸ The SEC reported that J.P. Morgan has “already begun upgrades to employees’ software to improve compliance.”⁵⁹

D. Relevance to Current Financial Conditions and Lessons Learned

Not only is the SEC’s fine the largest of its kind; it also represents a reputational threat.⁶⁰ By going after the world’s largest firm on Wall Street, the SEC and CTFC have put the entire broker-dealer industry on high alert.⁶¹ The Pandemic has only increased the need for firms to review their document preservation processes and ensure employee compliance.⁶² From the moment the Pandemic forced most Wall Streeters to start working outside the office in 2020, concern grew over how securities firms would ensure compliance with strict U.S. regulations to keep recordings of employee calls and written communications.⁶³ The SEC inspections unit even issued an industry-

bank overhaul its policies and procedures for retaining communications on personal devices.”).

⁵⁷ Thomas Fox, *On the Naughty List – JPMorgan and Failures for Record Keeping*, JD SUPRA (Dec. 21, 2021), <https://www.jdsupra.com/legalnews/on-the-naughty-list-jpmorgan-and-9393224/> (describing the various substantive duties of the compliance consultant).

⁵⁸ *Id.* (noting the consultants role in oversight).

⁵⁹ Franck & Son, *supra* note 5 (“The bank had already begun upgrades to employees’ software to improve compliance, the SEC said.”).

⁶⁰ *Id.* (“While SEC officials said the \$125 million penalty is its largest record-keeping fine to date, the bigger threat to JPMorgan may be reputational.”).

⁶¹ *Id.* (implying that the agency’s enforcement decision is as strategic as it is legally necessary).

⁶² *Id.* (describing the difficulties of documenting communications when every employee must be remote).

⁶³ Andrea Gordon et. al., *Enforcement appears as messages disappear: The perils of personal and ephemeral messaging*, JD SUPRA (Jan. 7, 2022), <https://www.jdsupra.com/legalnews/enforcement-appears-as-messages-9351033/> (“Companies should take this enforcement action as an opportunity to assess whether and how their corporate compliance programs

wide alert that urged firms to consider enhancing their oversight procedures with so many employees off-site.⁶⁴

Although J.P. Morgan reminded employees to refrain from using personal devices for business messages, ordered employees to sift through years of text messages on personal devices and set aside any related to work,⁶⁵ and was in the process of enhancing its policies and procedures on employee communications,⁶⁶ these steps were clearly not enough. The remedial obligations imposed on J.P. Morgan should be studied by compliance professionals across Wall Street. Leveraging J.P. Morgan as a case study can help other broker-dealer firms establish their own best practices and determine any gaps in their company's electronic data recordkeeping compliance frameworks.⁶⁷ In a press release published by the SEC following its charges against J.P. Morgan, SEC Chair Gary Gensler urged registrants to "ensure that their communications are appropriately recorded and are not conducted outside of official channels."⁶⁸

The SEC's Office of Compliance Inspections and Examinations (OCIE) has also released a series of recommendations

ensure appropriate retention of personal communications and ephemeral messaging.").

⁶⁴ Ennis, *supra* note 7 ("The Securities and Exchange Commission's inspections unit, for example, issued an alert prodding companies to consider strengthening their record-keeping efforts.").

⁶⁵ Hannah Levitt & Michelle F. Davis, *JPMorgan Staff Irked Over Order to Save Texts on Personal Phones*, BLOOMBERG (June 11, 2021), <https://www.bloomberg.com/news/articles/2021-06-11/jpmorgan-staff-irked-over-order-to-save-texts-on-personal-phones> ("JPMorgan employees privately acknowledge that the bank reminded them as the pandemic set in that they should refrain from using personal devices for business messages.").

⁶⁶ *In re J.P. Morgan Sec. LLC* Release No. 93807, 2021 WL 5986789 (Dec. 17, 2021) ("JPMorgan maintained certain policies and procedures designed to ensure the retention of business-related records, including electronic communications, in compliance with the relevant recordkeeping provisions.").

⁶⁷ Fox, *supra* note 57 ("All of these obligations should be studied by compliance professionals for not only best practices but to determine any gaps in your company's electronic data record keeping regime.").

⁶⁸ Press Release, SEC, *JPMorgan Admits to Widespread Recordkeeping Failures and Agrees to Pay \$125 Million Penalty to Resolve SEC Charges* (Dec. 17, 2021) (on file with author) ("As technology changes, it's even more important that registrants ensure that their communications are appropriately recorded and are not conducted outside of official channels in order to avoid market oversight," said SEC Chair Gary Gensler.").

related to electronic messaging.⁶⁹ It urges firms to proactively inform employees that violations of digital communications rules may result in discipline or dismissal.⁷⁰ The OCIE also advises firms to provide regular reminders to employees of what is permitted and prohibited under the firm’s policies and procedures with respect to electronic messaging.⁷¹ Finally, the OCIE recommends soliciting feedback from firm employees as to what forms of messaging are requested by clients;⁷² this may better allow compliance folks to assess their risks and how those forms of communication may be incorporated into firm policies.⁷³

E. Conclusion

The SEC and CFTC’s investigation and prosecution of J.P. Morgan puts the complex world of federal securities regulation into the spotlight. The Pandemic has only increased the need for broker-dealer firms to adapt and strengthen their policies around their employees’ electronic communications. Constant vigilance is required by compliance functions if a firm hopes to remain in compliance with its federal securities recordkeeping requirements.

Although the SEC and CFTC’s charges against J.P. Morgan represent the latest move in a fierce and ongoing battle between regulators and registrants, firms should not fear for their own compliance.⁷⁴ Instead, the J.P. Morgan scandal should be leveraged as an important case study that firms can use to re-evaluate and strengthen their own recordkeeping compliance functions.

Margaux Arnston⁷⁵

⁶⁹ John Manganaro, *Texting Your Clients? Don’t Overlook SEC Communication Rules*, PLANADVISER (Dec. 18, 2018), <https://www.planadviser.com/texting-clients-dont-overlook-sec-communication-rules/> (“OCIO further encourages firms to proactively consider ‘improvements to their compliance programs that would help them comply with applicable regulatory requirements.’”).

⁷⁰ *Id.*

⁷¹ *Id.* (addressing the various problems that arise under rules that govern communications in electronic times).

⁷² *Id.* (“OCIE recommends soliciting feedback from personnel as to what forms of messaging are requested by clients and service providers in order for advisers to assess their risks...”).

⁷³ *Id.* (“how those forms of communication may be incorporated into their policies.”).

⁷⁴ Franck & Son, *supra* note 5.

⁷⁵ Student, Boston University School of Law (J.D. 2023).