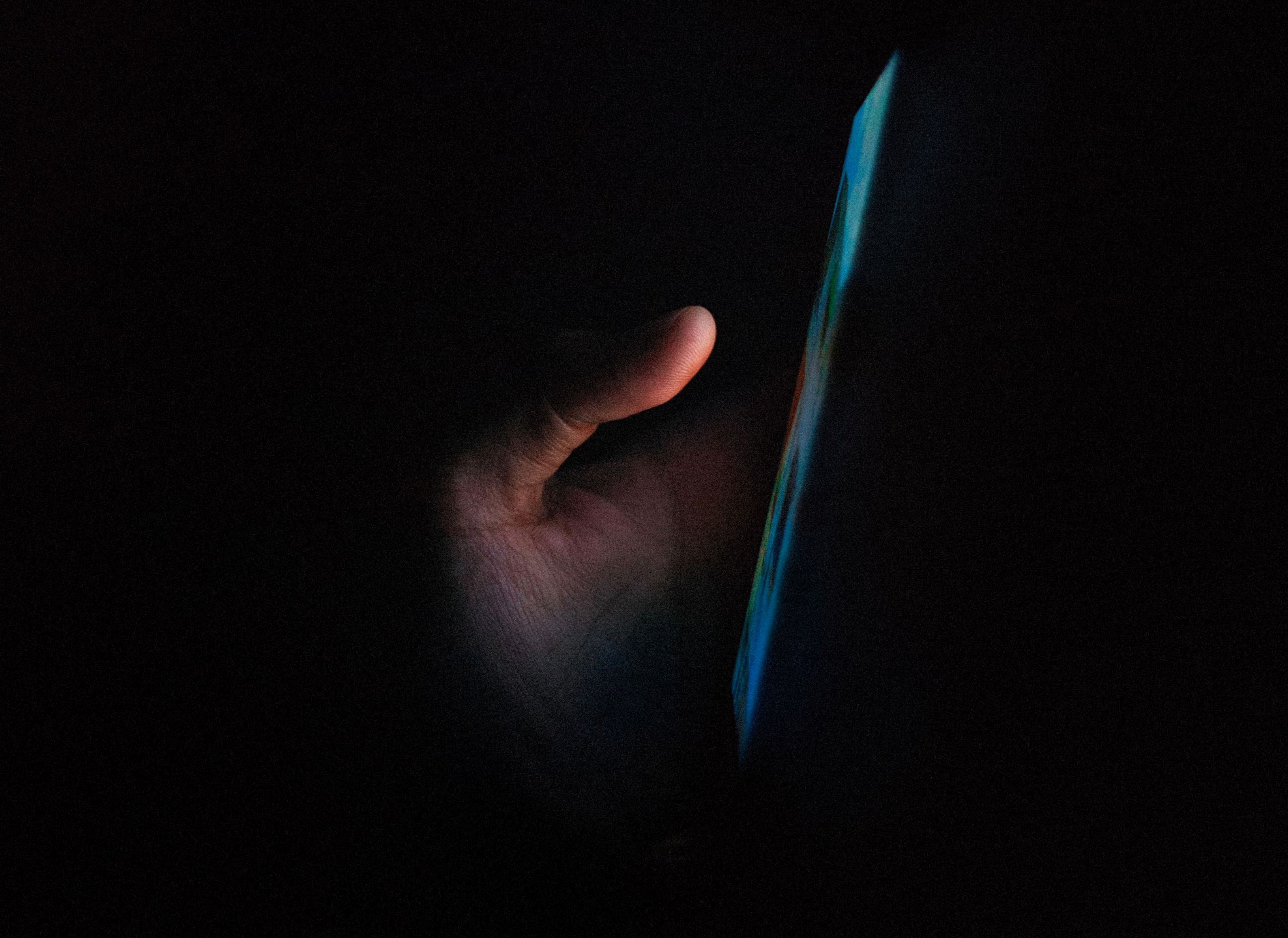
DECEMBER 2022

AlixPartners



WHAT REALLY MATTERS

Unapproved Communication Channels: Balancing ease of communication with regulatory expectations

EXECUTIVE SUMMARY

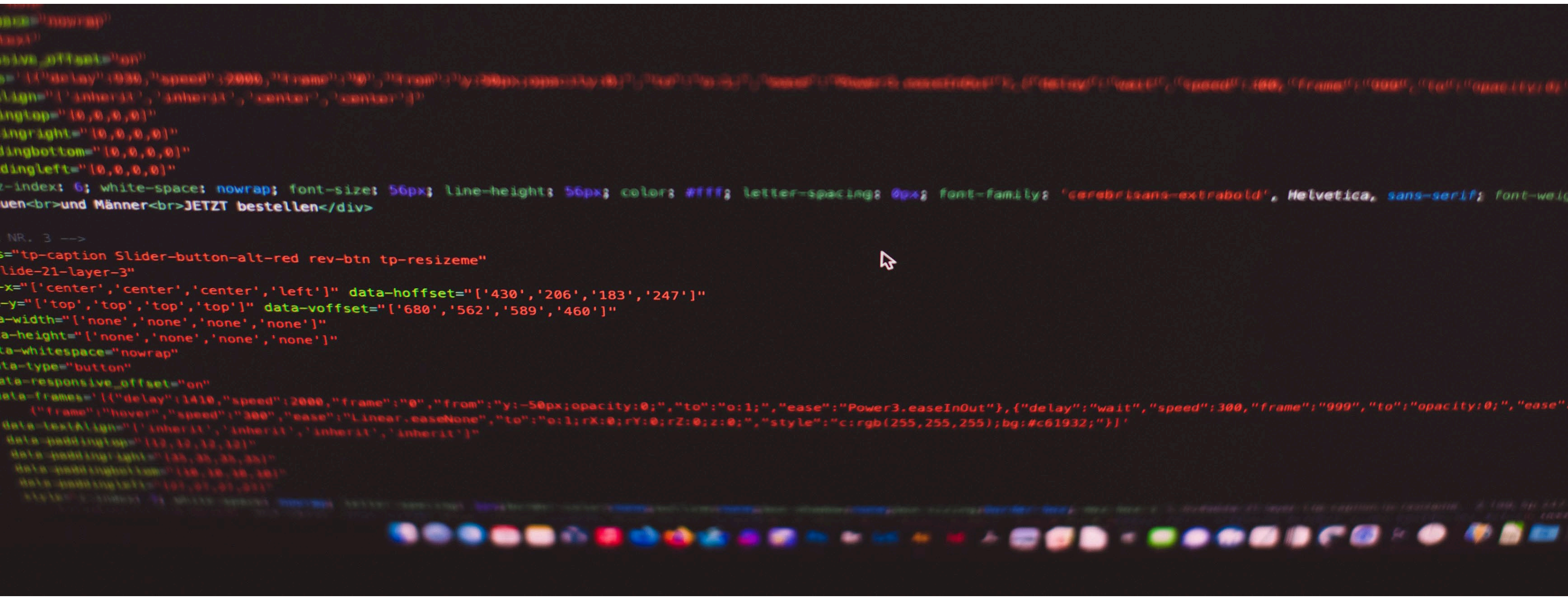
The SEC and CFTC's recent actions against Wall Street firms that tolerate the use of unapproved communications channels has put the industry on notice to rein in such practices amongst their employees.

The regulatory actions are not limited to the U.S.; in the second half of 2021, the FCA in the U.K. began discussions with a wide range of banks to discuss their practices around the use of private messaging by staff.

To avoid future penalties, firms should focus on reviewing and improving their electronic communications ("e-communications") framework. Such reviews typically reveal a need to enhance internal policies and procedures related to e-communications, implement new training and awareness activities for e-communications, and enhance e-communications monitoring tools. Designing an effective risk-based approach to monitoring the use of personal communications channels will help develop a comprehensive communications compliance program.

A QuickStrike^{sm} assessment of the overall communications framework – from policy to post-communications retention and monitoring – is a helpful way for corporations to prepare themselves and potentially avoid regulatory actions

If you would like to discuss our QuickStrike assessment for communications frameworks, please contact one of our experts here.



WHAT ISSUES DO WE SEE?

When Apple launched the first-generation iPhone in June 2007, few anticipated how quickly smartphones would become a necessity. As adoption spread, smartphone users flocked to messaging apps that offered new ways to communicate, such as WhatsApp, WeChat, Facebook Messenger, Twitter Direct Messages, SnapChat, and GChat.

In Financial Services, the increase in remote working as a result of the pandemic and regional nuances across markets (e.g. use of WeChat in Asia to conduct business) have accelerated the shift from traditional communications to these easy-to-use modes. This behavioral shift has had far-reaching consequences for firms in the industry and has put regulatory demands into direct conflict with the needs of tech-versed clients and employees.

Uncovering an industry-wide issue

In 2021, an unrelated regulatory examination at a major Wall Street firm piqued the interest of regulators worldwide and demonstrated the consequences firms face when they turn a blind eye to the use of unapproved messaging apps. During the examination, the firm was unable to provide all relevant books and records associated with the exam topic because messages were sent from and to an employee's personal device. The firm agreed to a multi-hundred million-dollar fine and admitted "employees often communicated about securities business matters on their personal devices, using text messages, WhatsApp, and personal email accounts. None of these records were preserved…these failures were firm-wide and practices were not hidden…[involving] supervisors, including managing directors and other senior supervisors."[1]

Since uncovering such issues, the SEC and CFTC have issued over $1.8bn in fines to more than 17 firms (and affiliates) for widespread and longstanding failures by firms and their employees to maintain and preserve e-communications.

"Since the 1930s, recordkeeping and books-and-records obligations have been an essential part of market integrity and a foundational component of the SEC's ability to be an effective cop on the beat. 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."[2]

Gary Gensler, SEC Chair

"We are actively discussing personal device use with a range of UK-authorized firms, not limited to those who may have been subjected to other regulatory enquiries."[2]

FCA Spokesperson

1. https://www.sec.gov/news/press-release/2021-262; 2. https://www.sec.gov/news/press-release/2022-174;
3. https://www.bloomberg.com/news/articles/2022-10-10/uk-s-fca-quizzes-banks-about-whatsapp-use-by-staff?leadSource=uverify%20wall

WHAT REALLY MATTERS:

To avoid future penalties, firms should focus on a rapid assessment of their overall e-communications framework, focusing on **three foundational areas** for improvement:

1. **Internal policies and procedures**

   Financial Services firms should continue to enhance and evolve their policies and procedures relating to e-communications. Many firms have adopted Bring Your Own Device ("BYOD") programs, which can raise privacy concerns for employees and create a grey area between business and personal communications. Policies and procedures, such as the firm's BYOD policy, employee handbook, and code of conduct/ethics, should be updated to clearly outline what is acceptable use.

   Policies should apply to internal communications between employees, communications with clients, and potential securities or business-related communications with outside parties (e.g. employees of other firms). They should detail what are acceptable modes of communication and what are not, and include how employees can retain work-related communications that may have occurred on a personal device or an unapproved platform. Policies should include escalating consequences for continual use of personal devices or unapproved platforms for business related communications.

   In addition, firms should seek compliance engagement and approval ahead of leveraging a new route-to-market with an embedded communication channel. Weighing in the feasibility and cost of additional surveillance may play a major factor in driving a firm to the right outcome.

2. **Training, awareness, and "Tone at the Top"**

   Financial Services firms must enhance their training and awareness programs to include real-life examples of how to identify when conversations become business-related and how to then redirect those communications to an approved communications channel.

   Messaging from senior executives and managers on the importance of using approved communications platforms should also be a priority focus. They must continually demonstrate in their communications and actions the importance of using approved communications platforms and should refrain from engaging in any business-related communications on an unapproved platform.

"Firms should seek compliance engagement and approval ahead of leveraging a new route-to-market with an embedded communication channel. Weighing in the feasibility and cost of additional surveillance may play a major factor in driving a firm to the right outcome."

WHAT REALLY MATTERS:

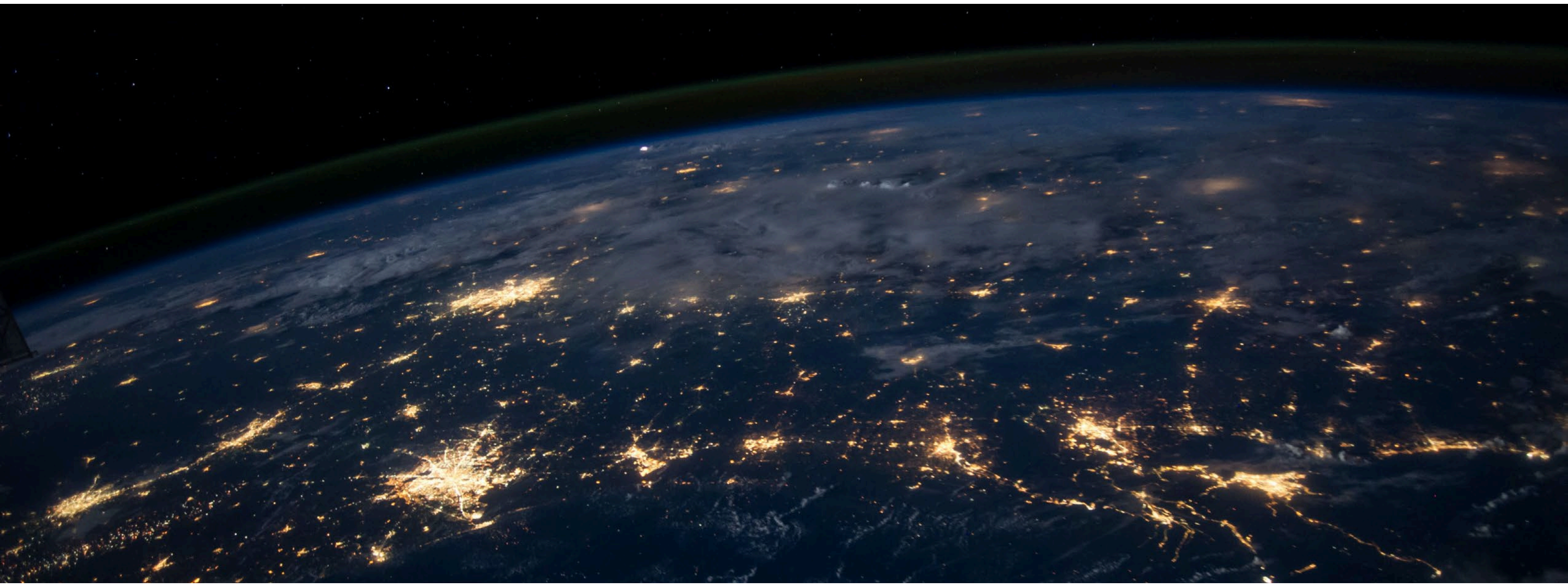
3. E-Communications Monitoring; Retention and Channel Blocks

While it may not be possible to monitor all communications platforms, Financial Services firms should continue to evolve and enhance e-communications monitoring and surveillance to detect the use of unapproved communications platforms.

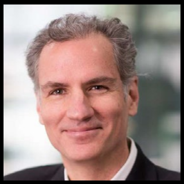
For company-issued devices, firms should consider making a business version of the most popular communications tools available to employees (e.g. WhatsApp, WeChat, etc.). The approved business versions could include complete monitoring via tools available in the market. Firms with a BYOD program can improve the lexicon and keyword triggers in e-communications monitoring tools for internal communications platforms (e.g. company email, Teams, Skype, Bloomberg, etc.) to identify when a conversation may have been moved to an unapproved platform.

In addition, all firms should consider findings from risk and compliance programs, such as customer complaints, internal hotline reports, audit and compliance testing findings, and risk assessments to identify and investigate instances where business communications may have occurred on an unapproved channel. When business communications are discovered on an unapproved channel, firms should make all efforts to preserve and repatriate the communications into compliance systems retroactively. Outside counsel may be required to review and segregate business communications vs. personal data and determine if any cross-border regulations may apply (e.g. firms may need to review data in multiple countries then export the data to relevant regulators).

Once these three foundational elements have been synthesized, supplementing with a risk-based approach to monitoring will help complete a communications compliance program.



FOR MORE INFORMATION CONTACT:



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ABOUT US

For more than forty years, AlixPartners has helped businesses around the world respond quickly and decisively to their most critical challenges – circumstances as diverse as urgent performance improvement, accelerated transformation, complex restructuring and risk mitigation.

These are the moments when everything is on the line – a sudden shift in the market, an unexpected performance decline, a time-sensitive deal, a fork-in-the-road decision. But it's not what we do that makes a difference, it's how we do it.

Tackling situations when time is of the essence is part of our DNA – so we adopt an action-oriented approach at all times. We work in small, highly qualified teams with specific industry and functional expertise, and we operate at pace, moving quickly from analysis to implementation. We stand shoulder to shoulder with our clients until the job is done, and only measure our success in terms of the results we deliver.

Our approach enables us to help our clients confront and overcome truly future-defining challenges. We partner with you to make the right decisions and take the right actions. And we are right by your side. When it really matters.