LITIGATION MINUTE: LITIGATION HOLDS IN THE INVESTMENT MANAGEMENT INDUSTRY

Date: 24 August 2021

U.S. Complex Commercial Litigation and Disputes Alert

By: Jordan A. Knight

WHAT YOU NEED TO KNOW IN A MINUTE OR LESS

Given the complexity of the transactions and arrangements involved, entities operating in the investment management industry face significant and unique obligations and risks, including the obligation to preserve and maintain certain categories of documents in the regular course of business. This obligation is further heightened when litigation is threatened or pending.

Entities operating in any industry are obligated to preserve documents for potential use in litigation once a lawsuit is reasonably anticipated. To accomplish this, counsel should circulate a litigation hold in the form of a letter or notice, sometimes referred to as a legal hold, instructing recipients to preserve electronic and/or hard copy documents that may serve as evidence in the anticipated litigation.

Even without a litigation hold in place, investment advisors and other investment management entities are obligated to preserve certain documents for specified periods of time. Section 204 of the Investment Advisers Act of 1940 (the Advisers Act), and Rule 204-2 thereunder require that registered investment advisers maintain specified books, records, advertisements, and other communications and make them available to Securities and Exchange Commission (SEC) examiners for inspection. Section 17(a)(1) of the Securities and Exchange Act of 1934 requires registered broker-dealers to keep and furnish prescribed records so that regulators may conduct effective examinations. A litigation hold likely expands the scope of an adviser's responsibilities for maintaining documentation, and potentially requires preserving certain materials beyond their statutory and regulatory obligations.

Timing

Once litigation commences, is threatened, or is otherwise reasonably anticipated, a party must take steps to ensure that potentially relevant documents are preserved by issuing a legal hold. A party should pause or modify routine document deletion practices to safeguard against the destruction of potentially relevant documents, as even routine or negligent destruction of documents can have adverse consequences on a litigant's case.

Recipients

A litigation hold notice should be directed to all potential custodians who may possess potentially relevant documents. Hold notices can be sent to all employees within a company or limited to a certain group. If threatened or pending litigation involves a particular investment transaction, the litigation hold should be directed to all personnel who were involved in or discussed that transaction.

©2005-2026 K&L Gates LLP. All Rights Reserved.

Content

The litigation hold notice will instruct recipients that any potential evidence relating to the matter must be preserved, and that periodic scheduled deletion or destruction must be paused to prevent the loss of potentially relevant documents.

The notice should identify categories and locations of documents to be preserved, and alert recipients that the notice covers paper documents and any electronically stored information (ESI). For investment advisers already preserving records for a specified period of time, a litigation hold may require these records be retained beyond the date required by statute and will require preservation of other documents and communications not contemplated by the statutory and regulatory frameworks.

Enforcement and Risks

Ensuring compliance with preservation notices is vital as intentionally deleting, or even negligently allowing destruction of evidence could result in preclusion sanctions, adverse inferences, lawyers' fees, and in extreme cases, default judgment.

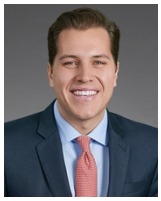
Counsel should require and track acknowledgment of the notice by all custodians and periodically re-issue the hold notice as a reminder to custodians, and as a failsafe to ensure any new employees are aware of the protocols in place.

KEY CONTACTS



ANDREW M. WRIGHT
PARTNER

WASHINGTON, DC
+1.202.778.9387
ANDREW.WRIGHT@KLGATES.COM



JORDAN A. KNIGHT
ASSOCIATE

BOSTON
+1.617.951.9253
JORDAN.KNIGHT@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.

©2005-2026 K&L Gates LLP. All Rights Reserved.