THE INVESTMENT LAWYER™
covering legal and regulatory issues of asset management

Vol. 20, No. 10 • October 2013

Social Media: The Ongoing Evolution of Internal Controls

By Jennifer L. Klass, Christine M. Lombardo, David A. McManus, and Andriette A. Roberts

Investment advisers and broker-dealers increasingly are embracing social media such as Facebook, Twitter, LinkedIn, YouTube, and Flickr, among many others, to promote their brands and attract and interact with clients and prospective clients. Although at its most basic level social media is just another form of electronic communication,[1] the fact that it provides a forum for interactive communications in real time, the nature of the multi-party dialogue and the ability of employees to simultaneously use social media for both personal and professional purposes presents unique compliance challenges. The result is that the use of social media requires advisers and brokers to implement a comprehensive framework of internal controls that addresses the supervisory, advertising, record keeping and other requirements under the federal securities laws. These regulatory challenges are further complicated by the impact of social media on the work-place and evolving guidance in the employment context that protects employee rights and limits an employer's ability to monitor the social media use of its employees—often with little regard for the regulatory requirements to which advisers and brokers are subject.

Jennifer L. Klass is a partner and Christine M. Lombardo is an associate in the Investment Management Practice Group of Morgan, Lewis & Bockius LLP. David A. McManus is a partner and Andriette A. Roberts is an associate in the firm's Labor and Employment Practice Group.

Against the backdrop of an already complex series of legal and regulatory challenges, we are now beginning to see increasing focus on the use and supervision of social media during regulatory examinations. For example, the Financial Industry Regulatory Authority (FINRA) recently conducted a "Spot Check of Social Media Communications" to inquire as to how member firms use social media and the specific business purpose behind such use.[2] The FINRA Letter requests information on the firm's supervisory policies and procedures regarding the production, approval and distribution of social media communications, as well as the measures the firm takes to monitor its social media use. The SEC's Office of Compliance Inspections and Examinations has also noted that social media has been an area of interest to the Staff and has published a "National Examination Risk Alert" discussing its observations on the use of social media by advisers.[3]

This article synthesizes the current regulatory landscape and provides practical guidance that advisers and brokers may wish to consider in reviewing existing internal controls and preparing for examinations regarding social media.

Develop a Comprehensive Social Media Policy

It is not uncommon for advisers and brokers initially to have approached social media on an ad hoc basis as various business units considered how the medium could be used to enhance or augment existing client outreach and marketing efforts (for example, to interact with clients and prospective clients, to advertise the firm's advisory or brokerage services, to promote brand recognition or to recruit talent). As a result, the policies and procedures and internal controls governing social media similarly may have developed on an ad hoc basis. In some cases, firms may have relied on existing policies relating to advertisements, client communications or electronic communications generally, as opposed to developing a dedicated social media policy.[4] Now that social media use has become the norm, however, firms should be implementing a comprehensive set of policies and procedures that govern the use of social media. In the context of diversified financial services firms, it is often important to consider how social media policies that are designed to comply with regulatory requirements integrate with corporate or enterprise-wide policies that may govern corporate communications or employee use of social media in general.

It is also critical that advisers and brokers identify the various uses of social media within the firm and the business purposes associated with each. This exercise is important for several reasons. First, it is important to understand the scope of a firm's use of social media to ensure that its compliance policies and procedures reflect the potential risks associated with the firm's social media strategy. As noted in the FFEIC Guidance, the size and complexity of a firm's risk management program should be commensurate with the breadth of the firm's involvement in social media.[5] The OCIE Risk Alert similarly reminded advisers that, consistent with the guidance under Advisers Act Rule 206(4)-7, they should be identifying conflicts and other compliance factors creating risk exposure in light of the firm's involvement in social media, and then testing whether the firm's policies and procedures address those risks.[6] Second, and perhaps most simply, advisers and brokers will be asked questions regarding the various uses of social media within the firm. As is evidenced in the FINRA Letter, future regulatory examinations likely will include a request for information about how firms use social media to conduct business and the specifics of their social media presence. As mentioned above, the FINRA Letter requested an explanation of how the firm currently uses social media (for example, Facebook, Twitter, LinkedIn, blogs) at the corporate level in the conduct of its business, as well as the specific business purpose of each social media site used by the firm. FINRA also asked for the specific URL for each of the broker's social media sites and a list of all individuals with authority to post and/or update content on each site.

The policies and procedures that firms adopt also should include a process for approving initial participation (either by the firm itself or by its employees) in a particular social media site and a process for conducting periodic ongoing reviews to evaluate the different features and risks presented by the use of social media.

For example, firms should consider the reputation of any site that they select, as well as that site's advertising practices and its privacy policies, among others, to ensure the use of the site is consistent with the firm's reputational and compliance standards.[7] Firms should also understand the features and functionality of the site, including the ability to remove third-party posts and controls on anonymous posting, to make sure that they can either address those features in their policies and procedures or disable them as appropriate.[8] Finally, in order to protect proprietary and client information from unauthorized access, firms should consider the information security measures implemented by a social media site.[9]

(Carefully) Limit Employee Use of Personal Social Networking Sites for Business Purposes

Controlling the message and the content of social media depends, to a large extent, on limiting the number of people authorized to "speak" on behalf of the firm and ensuring that those people receive appropriate training and education about the firm's policies on communicating through social media. It also requires that communications flow through firm-sponsored sites. As a result, one of the more sensitive—and inevitable questions—that advisers and brokers are faced with is whether they should limit or prohibit employee use of personal social networking sites for business purposes.

From a risk control perspective, the answer tends to be a qualified "yes" and consequently most firms do limit the use of social media by their employees. In adopting such restrictive policies, firms are generally mindful of the fact that communications made by employees may reflect poorly on the firm, thus creating a reputational risk. In addition, permitting the use of personal social media sites for business purposes requires the firm to consider whether and how it will be able to monitor such individual use, and how it will comply with its regulatory obligations, including applicable supervisory requirements, advertising restrictions and recordkeeping obligations. The result is that most firms prohibit their employees' personal use of social media for business purposes or, alternatively, require pre-approval of any such communications. One common exception, however, is "business card" type information (such as name of employer, title, areas of expertise) that is factual in nature and is not related to a particular business or product.

Advisers and brokers that impose restrictions on employee use of personal social media should be mindful of employment laws that protect an employee's ability to discuss their pay and working conditions. Specifically, Section 7 of the National Labor Relations Act (NLRA) gives non-supervisory employees the right to discuss their pay and working conditions, and prohibits employers from disciplining or terminating employees for properly exercising such right. Although the NLRA is associated with the governance of employer-employee relations in a unionized work environment, Section 7 of the NLRA applies to nonunionized employees as well, and the National Labor Relations Board (NLRB) treats "social media" complaints about employers no differently than more traditional complaints about employers. Indeed, the NLRB has held in several recent cases that an employer's social media and/or handbook policies were in violation of Section 7 of NLRA. For instance, a policy that prohibited: (1) discussing "private matters of members and other employees;" (2) electronically posting statements that "damage the Company, defame any individual or damage any person's reputation;" and (3) disseminating "[s]ensitive information such as membership, payroll, confidential financial, credit card numbers, social security numbers, or employee personal health information" was found to be impermissible. The policy broadly stated that such information "may not be shared, transmitted, or stored for personal or public use without prior management approval." In this case, the reference to "payroll" information and "damaging" statements above, rendered the entire provision violative of the employees' Section 7 right to discuss their pay and working conditions.[10] In light of these decisions, employers should thoroughly review policies concerning social media, use of email, confidentiality, privacy, codes of conduct, and

any other policies that may be incorporated by reference in a social media policy to make sure that they are not inconsistent with the employee rights protected under the NLRA.

Regardless of whether employees are prohibited or permitted (subject to certain limitations such as pre-approval) to use social media for business purposes, the real challenge is monitoring and testing for compliance with the firm's policies and procedures. This issue was the topic of a recent FINRA enforcement action where employees used Twitter in their personal capacity to promote the firm and failed to submit copies of those communications to the firm for review and retention in violation of the firm's policies and procedures.[11] In terms of monitoring and testing, some firms require employees to certify annually (or more frequently as to their compliance with social media policies).[12] Other firms randomly spot check websites or, increasingly, engage vendors to help them do so.[13]

According to a recent report by the Investment Adviser Association, a common approach to testing compliance with social medial policies is to require that employees "friend" or connect with the compliance officer or the firm's social media page.[14] We caution that this approach also raises privacy and employment law considerations. Several states have enacted laws prohibiting employers from demanding that current or prospective employees provide their user personal names or passwords to social media sites. For instance, in September 2012, California Governor Jerry Brown signed into law a bill prohibiting employers from demanding user names, passwords, or any other information related to social media accounts from employees or job applicants. Further, under this law, employers may not discharge or discipline employees who refuse to divulge such information. This restriction does not apply to passwords or other information used to access employer-issued electronic devices, and is not intended to infringe on employers' existing rights and obligations to investigate workplace misconduct.[15] The California legislation and similar state legislation introduces a personal privacy component that may impede an employer's right to monitor personal social media accounts used by employees for business purposes.[16] Thus, advisers and brokers should be mindful that state and local laws may adversely impact their supervisory and record keeping responsibilities.

Be Cautious of Employer Use of Social Media During the Hiring Process

If advisers and brokers expect their employees to observe limits in using personal social media for business purposes, the reverse is also true. Employers should be cautious about using personal social media sites as a tool in evaluating prospective employees during the hiring process. Screening applicants through social media is a growing trend. According to the National Association of Colleges and Employers (NACE), more than half of all employers use some kind of online screening technology, including social networking sites such as Facebook and MySpace. In addition to social networking sites, some employers use search engines and other Internet sites such as PeopleFinders.com, Local.Live.com, Zillow.com, Feedster.com, Technorati.com (to search for blogs), and Opensecrets.org and Fundrace.org (to search for campaign donations).[17]

Employer viewing of applicant personal information on blog/social networking sites may inadvertently trigger issues under applicable antidiscrimination laws. For example, sites may provide an employer with information that the employer is otherwise prohibited from obtaining through the traditional interview or application process—that is, information regarding the age, race, national origin, disability, sexual orientation, and other protected categories of the applicant. If an applicant were rejected for a job, and there is a later lawsuit challenging the employer's decision not to hire the applicant, the employer may find it difficult to prove that it did not view and improperly rely on this personal information. Even if not unlawful, employers may be making employment decisions based on inaccurate information. Thus, it is recommended that employers put in place carefully considered policies regarding the use of social media in connection with hiring, and other aspects of managing employees.

Manage Risks Associated with Third-Party Content

Social media creates the unique opportunity for third parties to create and contribute content. Advisers and brokers have long worried about liability for third-party content in the context of electronic communications, particularly hyperlinks to other sites.[18] However, the multi-party dialogue that characterizes social media highlights this concern, as do "retweets" and other social media features that provide links to, or incorporate content from, other websites.

FINRA generally does not treat posts by customers or third parties as the firm's content for purposes of the principal approval, content and filing requirements of FINRA Rule 2210.[19] Third-party content may become attributable to the firm, however, if the firm involves itself in the preparation of the information or explicitly or implicitly endorses or approves the information.[20] These so-called entanglement and adoption theories are borrowed from an April 2000 interpretive release designed to provide guidance on the extent to which issuers may be responsible for third-party information to which they hyperlink.[21] FINRA has adopted these theories and applied them to third-party posts on social media sites.[22] Although OCIE and the SEC's Division of Investment Management ultimately may take the same position, it is interesting to note that the OCIE Alert discusses appropriate controls around third-party content, but does not go so far as to incorporate the entanglement and adoption theory, which was articulated by the SEC's Division of Corporate Finance in the context of issuer's websites.

Firms have adopted a number of approaches to limit third-party liability, including: (i) permitting only "one way postings" where the firm or its authorized employees are permitted to post content, but do not interact with third parties or respond to third-party posts; (ii) limiting third-party postings to authorized users and prohibiting postings by the general public; and (iii) posting disclaimers making clear that they do not approve or endorse any third-party communications posted to their site.[23] Still other firms publish usage "guidelines" for clients or third parties that are permitted to post.[24]

The more controversial question is whether advisers and brokers have an obligation to remove third-party posts. There is no regulatory obligation to remove posts. However, as discussed in more detail below, firms should monitor their social media sites for a range of issues and should have the capability to remove content that is inappropriate or otherwise inconsistent with usage guidelines or advertising requirements. In this regard, FINRA has provided helpful guidance stating that a firm's general policy of monitoring and deleting third-party content does not lead to the conclusion that third-party content that is *not* deleted will be deemed to be endorsed or adopted by the firm.[25] We caution, however, that this position implicitly assumes that firms have implemented objective criteria for the deletion of third party content. As the Massachusetts Securities Division has noted, where an adviser "selectively deletes third-party material unfavorable to the adviser but continues to display favorable content," that adviser "may be deemed to adopt the remaining content."

Comply with Substantive Content Requirements

Social media communications are governed by the same substantive content requirements that advisers are subject to under Advisers Act Rule 206(4)-1 and brokers are subject to under FINRA Rule 2210, as well as the general antifraud requirements of the federal securities laws. Nevertheless, there are some unique content issues presented by social media.

One of the most significant areas of focus for advisers—and the one most ripe for evolution of the current regulatory position—is the prohibition on the use of testimonials under Advisers Act Rule 206(4)-1(a)(1).[26] While the term "testimonial" is not defined under the Advisers Act, the SEC has consistently interpreted the term to include a statement of a client's experience with, or endorsement of, an investment adviser.[27] The SEC adopted the prohibition against the use of testimonials based on the view that testimonials are intrinsically misleading because of their conclusory nature. According to the SEC, testimonials "by their very nature[,] emphasize the comments and

activities favorable to the investment adviser and ignore those which are unfavorable."[28] The SEC Staff has subsequently made clear its concern that testimonials tend "to give rise to a fraudulent or deceptive implication or mistaken inference that the experience of the person giving the testimonial is typical of the experience of the adviser's clients."[29]

As applied to social media, any statement of a client's experience with an adviser that is posted by the client or other third parties, including the use of the "like" button on Facebook, the "follow" feature on Twitter, the "recommendation" function or the "endorse" feature on LinkedIn, may be viewed as a testimonial. However, the prohibition on the use of testimonials was developed well before the advent of the Internet, let alone the social media explosion, and arguably assumed a two-party communication between the adviser and the client or prospective client where the adviser was restating a client's views. Direct communications from clients that are not intermediated by the adviser (for example, where the adviser has adopted controls to avoid removing only negative statements and leaving favorable posts and has adopted appropriate usage guidelines designed to discourage testimonials) arguably should not be inconsistent with the policy considerations underlying the rule; however, this is not the current SEC position.

In the OCIE Risk Alert, the Staff discussed testimonials, stating that "*… depending on the facts and circumstances*, the use of 'social plug-ins' such as the 'like' button *could* be a testimonial under the Advisers Act." (Emphasis added.) We do not read this to mean that the use of "like" or similar features are automatically considered testimonials, but rather that they could be viewed as testimonials depending on the facts and circumstances. The Massachusetts Guidance makes this clear. That guidance specifically states that "'[l]ikes' by themselves" are not likely to give rise to the mistaken impression of a reader that the experience of one client is likely to be achieved by all clients. However, were the adviser to promote the number of "likes" that it has collected as evidence of its ability as an adviser, that activity would cross the line and be considered a testimonial. The Massachusetts Securities Division further concluded that a client recommendation posted on a LinkedIn page would rise to the level of a testimonial.[30]

In order to address the testimonial issue, advisers (and brokers) may consider the following approaches, many of which were discussed in the applicable regulatory guidance:

- Evaluate whether the particular feature or function is inconsistent with the testimonial rule;
- Consider whether the social media site the firm uses permits functions designed to facilitate recommendations or endorsements to be disabled or removed from public view;
- Adopt usage guidelines designed to discourage clients from posting content that reflects their experience with the firm or otherwise endorsing its capabilities;
- Periodically review social media sites to remove content that is inconsistent with usage guidelines because it raises testimonial considerations, but make sure that the removal of such content is based on objective criteria so that the firm does not remove only unfavorable content;
- Include appropriate disclosures designed to clarify that client statements, "likes" or other features should not necessarily be considered a positive reflection on the firm's services and may not reflect the experience of all clients;[31] and
- Do not solicit client endorsements or otherwise develop marketing or promotional materials based on the feedback provided through social media sites.

It is worth noting that although testimonials are widely discussed in the advisory context, the typical restrictions on performance advertising and the use of past specific recommendations continue to apply to social media content. Accordingly, advisers and brokers should consider whether to prohibit specific content or impose other content restrictions.[32]

Review and Monitor Social Media Content

Although the Advisers Act does not mandate pre-approval requirements (or any approval requirements for that matter), the OCIE Alert recommended that advisers consider the

appropriateness of pre-approval requirements instead of simply relying on post-review. In the broker context, pre-approval by a registered principal is required in certain cases.

The determination of whether pre-approval is required turns on whether the communication is static content that is considered an advertisement or whether it is an unscripted communication with the public that occurs in an "interactive electronic forum." Social media sites contain both static and interactive content. According to FINRA, static content remains posted until it is changed by the firm and is accessible to all visitors on the site.[33] Static content, which includes profile, background and wall information, is subject to prior approval under FINRA Rule 2210(b)(1).[34]

In contrast, "interactive electronic forums" are not subject to pre-approval requirements.[35] These types of "non-static, real-time communications" include interactive posts on social media sites. Blogs where real-time communication occurs, would also fall within this category. Thus, "[t]he portion of a social networking site that provides for these interactive communications constitutes an interactive electronic forum, and firms are not required to have a registered principal approve these communications prior to use."[36] It should be noted that interactive content can become static if it is copied or forwarded and posted in a static forum.[37] Also, interactive electronic forums are considered "public appearances" under FINRA Rule 2210(f) and, although they are not subject to pre-approval, such communications must still be supervised.

Consistent with the supervisory requirements of FINRA Rule 3010(d) that apply in the brokerage context and applicable regulatory guidance, firms typically review interactive content posted on social media sites on a post-use basis.[38] The post-use review generally incorporates sampling and lexicon-based search methodologies and, increasingly, advisers and brokers are relying on third-party vendors that provide systems designed to aid in the review and retention of social media communications. In developing or re-assessing a post-use review system, firms should be cognizant of the frequency of the monitoring they are performing—real time, daily or on a more periodic basis. That determination is typically based on the volume and pace of communications and the subject matter of the conversion streams that are discussed on a particular social media site, among other things. The OCIE Alert cautioned that "after-the-fact review of violative content days after it was posted on a firm's social networking site, depending on the circumstances, may not be reasonable, particularly where social media content can be rapidly and broadly disseminated to investors and the markets."[39]

In addition to considerations as to the frequency of review, monitoring of social media communications should also take other regulatory requirements into consideration. For example, under FINRA Rule 3010, brokers have an obligation to monitor incoming and outgoing correspondence of registered representatives and to identify and report customer complaints.

Keep Records of Social Media

Although the supervision and monitoring of social media may vary depending on the type of communication and whether it is static or interactive, the record keeping requirements are governed by content alone.[40] One of the most onerous challenges advisers and brokers face in using social media is complying with applicable recordkeeping requirements.

Advisers are required to maintain copies of all social media communications that contain required books and records under Advisers Act Rule 204-2. Of particular note in the context of social media is Advisers Act Rule 204-2(a)(7), which requires advisers to keep "[o]riginals of all written communications received and copies of all written communications sent by such investment adviser relating to (i) any recommendation made or proposed to be made and any advice given or proposed to be given, (ii) any receipt, disbursement or delivery of funds or securities, or (iii) the placing or execution of any order to purchase or sell any security…." Although this rule includes an exception for "unsolicited market letters and other similar communications of general public distribution not prepared by or for the investment adviser," it is not clear whether this exception would exclude

certain types of social media from the record keeping requirements. Accordingly, advisers should be cognizant of the fact that they may be required to retain communications (or posts) that they send, as well as social media posts that they *receive* relating to their recommendations or advice.

In the broker context, the record keeping obligations are more expansive. In addition to any other record keeping requirements to which brokers may be subject,[41] Rule 17a-4(b)(4) under the Exchange Act requires that brokers retain "[o]riginals of all communications received and copies of all communications sent (and any approvals thereof) by the member, broker or dealer (including inter-office memoranda and communications) relating to its business as such, including all communications which are subject to rules of a self-regulatory organization of which the member, broker or dealer is a member regarding communications with the public." Like the Advisers Act requirement discussed above, this provision requires brokers to retain communications that are sent and received—both by the firm itself through its social media presence or by employees who are authorized to use social media for business purposes.

Given the broad range of opportunities to communicate via social media—including status updates, discussion boards, emails, texts, direct messages and chat rooms—there are an endless number of permutations of communications that advisers and brokers may be required to retain. As discussed above, firms increasingly are relying on third-party vendors to assist them in monitoring their social media communications and help them to meet their recordkeeping obligations.

Conclusion

In the area of social media, it is important that the compliance infrastructure and internal controls evolve as quickly as the medium itself. This is admittedly not an easy task given the complexity of both the regulatory and employment law considerations that come into play. However, given the expansive supervisory, advertising and record keeping requirements to which firms are subject—as well as the increasing interest on the examination and enforcement side—advisers and brokers would be well advised to take a fresh look at any existing policies and procedures governing the use of social media.

Notes

1. *Social media is defined in any number of different ways.* The Securities and Exchange Commission (SEC) describes social media as "an umbrella term that encompasses various activities that integrate technology, social interaction and content creation. Social media may use many technologies, including, but not limited to, blogs, mircoblogs, wikis, photos and video sharing, podcasts, social networking, and virtual worlds." *Investment Adviser Use of Social Media,* SEC National Examination Risk Alert by the Office of Compliance Inspections and Examinations, Vol. II, Issue 1, Jan. 4, 2012 (OCIE Risk Alert). The banking regulators describe it as "a form of interactive online communication in which users can generate and share content through text, images, audio, and/or video." *Social Media: Consumer Compliance Risk Management Guidance,* Federal Financial Institutions Examination Council, Docket No. FFIEC-2013-0001, Jan. 17, 2013 (FFIEC Guidance).

2. *Spot-Check of Social Media Communications*, FINRA Targeted Examination Letters (June 2013) available at *http://www.finra.org/Industry/Regulation/Guidance/TargetedExaminationLetters/P282569* (FINRA Letter); *See also*, Jason Wallace, "State Regulator's Deficiency Letter Offers Clues for Social-Media Policies," Thomson Reuters News & Insight (May 29, 2012) (noting that reported deficiencies arising from a state examination of social media included, among other things, the adviser's failure to: (i) adequately train employees in social media use; (ii) outline and create proper procedures for social media use; (iii) monitor use via the firm's third-party service provider; and (iv) recognize that a customer's use of the "like" button on Facebook may be a testimonial.)

3. OCIE Risk Alert at p.2.

4. *See* OCIE Risk Alert at p.2 (observing that relying on multiple overlapping procedures may cause confusion as to what procedures apply to social media and that many procedures that firms are currently using are not specific as to the types of social networking activity that was permitted or prohibited by the firm).

5. *See* FFIEC Guidance at p.10. This approach is consistent with SEC guidance under Investment Advisers Act of 1940 (Advisers Act) Rule 206(4)-7, which gives advisers the flexibility to adopt and implement policies and procedures tailored to the particular business practices of the firm. *See Compliance Programs of Investment Companies and Investment Advisers*, Advisers Act Release No. 2204 (Dec. 17, 2003) at Section II.A.1.

6. *See* OCIE Risk Alert at p.3.

7. OCIE Risk Alert at p.4.

8. *Id.* at p.4.

9. *Id.*

10. *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106 (Sept. 7, 2012); *See also, Banner Estrella Med. Ctr.*, 358 NLRB No. 93 (July 30, 2012) (prohibiting a blanket rule requiring that employees keep internal human resources or legal investigations confidential and not discuss workplace complaints with coworkers during an ongoing investigation); *Knauz BMW*, 358 N.L.R.B. No. 164 (Sept. 28, 2012) (invalidating prohibitions against "disrespectful" conduct or "language which injures the image or reputation of the [employer]" because it could reasonably be expected to encompass Section 7 activity).

11. FINRA Order Accepting Offer of Settlement No. 2008011650601 (Feb. 8, 2012) (finding such actions violated NASD Conduct Rules 3010(a), 3010(b), 3110 and 2110 and FINRA Rule 2010, as well as Rule 17a-4(b)(4) under the Securities Exchange Act of 1934 (Exchange Act)).

12. *Social Media Websites and the Use of Personal Devices for Business Communications*, FINRA Regulatory Notice 11-39 (August 2011) (FINRA Notice 11-39) at Q7.

13. FINRA Notice 11-39 at Q7.

14. *2013 Investment Management Compliance Testing Survey*, Investment Adviser Association (June 11, 2013) available at *https://www.investmentadviser.org/eWeb/docs/Publications_News/Reports_and_Brochures/Investment_Management_Compliance_Testing_Surveys/2013IMCTSppt.pdf.*

15. Other states that have enacted similar laws include Arkansas, Colorado, Illinois, Maryland, Michigan, Nevada, New Mexico, Oregon, Utah, Vermont and Washington. Other state legislatures, including Minnesota, Missouri, New Jersey, New York, Ohio, Pennsylvania and South Carolina, have introduced similar social media bills.

16. *See* letter from A. Heath Abshure, NASSA President and Arkansas Securities Commissioner to William T. Pound, Executive Director, The National Conference of State Legislatures (Feb. 14, 2013) available at *http://www.nasaa.org/wp-content/uploads/2011/07/NASAA-letter-to-NCSL-Regarding-Social-Media-Privacy-Legislation-FINAL-2-14-2013.pdf*.

17. La Jean Humphries, "The Impact of Social Networking Tools and Guidelines to Use Them," *LLRX.COM*, Jan. 15, 2007, *http://www.llrx.com/features/good-google.htm*.

18. *See* NASD Interpretive Letter to Craig S. Tyle, General Counsel, Investment Company Institute (Nov. 11, 1997).

19. *Social Media Web Sites*, FINRA Regulatory Notice 10-06 (January 2010) (FINRA Notice 10-06) at Q8.

20. FINRA Notice 10-06 at Q8. *See also, Guidance on the Use of Social Media by Investment Advisers*, Massachusetts Securities Division (Jan. 18, 2012) (Massachusetts Guidance) available at *http://www.sec.state.ma.us/sct/sctpdf/The-Use-of-Social-Media-by-Investment-Advisers.pdf.*

21. *See Use of Electronic Media*, Securities Act Release. No. 7856 (April 28, 2000).

22. FINRA Notice 10-06 at Q8.

23. OCIE Risk Alert at p.5; FINRA Notice 10-06 at Q9 (indicating that if a firm were to use a disclaimer that was sufficiently prominent to inform customers that third-party posts do not reflect the views of the firm and have not been reviewed by the firm for completeness or accuracy, the disclaimer would be part of the facts and circumstances that FINRA would consider in an analysis of whether a firm had adopted or become entangled with a posting).

24. FINRA Notice 10-06 at Q10.

25. FINRA Notice 11-39 at Q12.

26. There is no outright prohibition on the use of testimonials by brokers. *See* FINRA Rule 2210(d)(6).

27. *See e.g.,* Denver Investment Advisors, Inc., SEC No-Action Letter (publicly avail. July 30, 1993).

28. *Adoption of Rule 206(4)-1*, Advisers Act Release No. 121 (Nov. 2, 1961).

29. *See* Denver Investment Advisors, Inc., *supra* n.27.

30. In analyzing the differences between the Facebook and LinkedIn features, the Massachusetts Securities Division considered various criteria that may be helpful in evaluating similar features in the future. These criteria include: (1) the purpose of the testimonial rule; (2) whether the adviser has control over the content's display on his or her website; (3) whether the third party content creator had any control as to its substance; (4) whether the "Like" or "Recommend" function necessarily represents a favorable description of the adviser; and (5) whether the "Like" or "Recommend" function provides any function outside a favorable description of the adviser.

31. The Massachusetts Guidance specifically provided the following sample disclosure for Facebook: "'Likes' should not be considered a positive reflection of the investment advisory services offered by [Investment Adviser]. Visitors to this page must avoid posting positive reviews of their experiences with the adviser or its services as such testimonials are prohibited under state and federal securities laws and may not reflect the experience of all clients of [Investment Adviser]."

32. OCIE Risk Alert at p.3 (noting that "a majority of the advisers we observed prohibited the posting of recommendations or information on specific products or services on their social media sites"). Firms may also wish to consider limiting the dissemination or discussion of projections of investment return, rumors, private investment funds and proprietary or non-public information.

33. FINRA Notice 10-06 at Q5.

34. *Id.*

35. FINRA Rule 2210(b)(1)(D)(ii).

36. FINRA Notice 10-06 at Q5.

37. FINRA 11-39 at Q6.

38. FINRA Notice 11-39 at Section 2.

39. OCIE Risk Alert at p.4.

40. FINRA Notice 11-39 at Q5. *See also*, OCIE Risk Alert at p.6 (noting that "[i]n the [S]taff's view, the content of the communication is determinative" in analyzing whether social media communications should be maintained).

41. *See, e.g.,* Exchange Act Rules 17a-3 and Rule 17a-4, FINRA Rule 2210(b)(4) (recordkeeping requirements for communications with the public), NASD Rule 3010(d)(3) (retention of correspondence) and FINRA Rule 4511 (general recordkeeping requirements).