



Update on Social Media Compliance

**Jennifer L. Klass, Morgan Lewis
John Gebauer, NRS**

**NRS 29th Annual Spring Compliance Conference
Orlando, Florida
May 14, 2014**

Agenda

- **Social Media Basics**
 - ✓ What is Social Media?
 - ✓ Why do people care about it?
 - ✓ How are firms using it?
- **Regulatory Landscape**
 - ✓ Regulatory Guidance
 - ✓ IA and BD Regulatory Considerations
 - ✓ Other Legal Considerations
- **Implementing a Social Media Compliance Program**
 - ✓ Policies and Procedures
 - ✓ Training and Education
 - ✓ Monitoring and Testing

Social Media Defined

An umbrella term that encompasses various activities that integrate technology, social interaction and content creation.

Social media may use many technologies...



What are Social Media?

- The use of web-based and mobile technologies to turn communication into interactive dialogue
 - ✓ Regular media: a one-way street where you can read a newspaper or listen to a report on television
 - ✓ Social media: a two-way street that gives the consumer the ability to communicate, too
 - An online communications platform that doesn't just give you information, but interacts with you while giving you that information (asking for your comments or giving you recommendations based on ratings of other people with similar interests)
- Users form groups to share common interests
- Social authority: an individual or organization establishes themselves as an “expert” in their given field, thereby becoming an influencer

Social Networking Not a New Idea

- Internet has long been home to communities
 - ✓ Linked by common interests, demographics, topics
 - ✓ Usenet, IRC, chat rooms & message boards
 - ✓ Efficient way to reach large numbers of people regardless of location
 - ✓ Anonymity/pseudonymity a factor
- New Services have developed for new purposes
 - ✓ Growing number of social media services/sites
 - ✓ Offer multimedia, commerce, networking
 - ✓ Accessible via multiple devices/programs
 - ✓ Issues of privacy & ethics
 - ✓ Major 3: Facebook, LinkedIn & Twitter

Current statistics for Facebook, LinkedIn and Twitter users and usage



Facebook

- 802 million Daily Active Users
- 1.28 billion Monthly Active Users
- 640 billion minutes spent on Facebook per month (that's 1.2 million years!)
- 81 million fake Facebook profiles



Twitter

- 646 million active registered users
- 255 million monthly active users
- 500 million Tweets are sent per day
- 77% of accounts are outside the U.S.



LinkedIn

- 300 million total users
- 67% of users are outside the U.S.
- 15 million daily profile views

and many more...



Benefits and uses of Social Media

- Reach new prospects
- Obtain competitive intelligence
- Interact with clients
- Increase brand awareness of firm and key employees
- Gain differentiation from competition
- Find, screen and recruit potential employees
- Low cost and potential high returns
- Search Engine Optimization (SEO)
- Public relations
- Distribution of research publications and market commentary

Common Challenges of Electronic Business Communication

- Addressing and attachment errors
- Lack of nuance & tone
- Heightened expectations of responsiveness
- Informality
- Compliance
- Management and supervision
- Resources and time commitment
- Recordkeeping requirements
- Monitoring and testing

Agenda

- Social Media Basics
 - ✓ What is Social Media?
 - ✓ Why do people care about it?
 - ✓ How are firms using it?
- Regulatory Landscape
 - ✓ Regulatory Guidance
 - ✓ IA and BD Regulatory Considerations
 - ✓ Other Legal Considerations
- Implementing a Social Media Compliance Program
 - ✓ Policies and Procedures
 - ✓ Training and Education
 - ✓ Monitoring and Testing

Selected Regulatory Guidance

- *Guidance on the Testimonial Rule and Social Media*, IM Guidance Update (March 2014)
- *Filing Requirements for Certain Electronic Communications*, IM Guidance Update (March 2013)
- *Investment Adviser Use of Social Media*, SEC National Examination Risk Alert (Jan. 4, 2012)
- *Use of Electronic Media*, Release No. 33-7856 (April 28, 2000)
- *Social Media Websites*, FINRA Regulatory Notice 10-06 (January 2010)
- *Social Media Websites and the Use of Personal Devices for Business Communications*, FINRA Regulatory Notice 11-39 (August 2011)

Selected Regulatory Guidance

- *Guidance on the Use of Social Media by Investment Advisers*, Massachusetts Securities Division (Jan. 18, 2012)
- *Social Media: Consumer Compliance Risk Management Guidance*, Federal Financial Institutions Examination Council (Jan. 17, 2003)
- *Report of the Acting General Counsel Concerning Social Media Cases*, NLRB Memorandum OM 12-59 (May 30, 2012)
- FundersClub and AngelList SEC No-Action Letters (March 2013)
- SEC Report of Investigation of Netflix, Inc. (April 2013)
- SEC Administrative Proceeding (January 4, 2012)
 - In the Matter of Anthony Fields, CPA d/b/a ANTHONY FIELDS & ASSOCIATES and d/b/a PLATINUM SECURITIES

Regulatory Considerations

- Investment adviser rules concerning
 - ✓ Advertising
 - ✓ Privacy
 - ✓ Supervision
- Broker-dealers
 - ✓ Correspondence
 - ✓ Communications with the public
 - ✓ Surveillance and supervision
- Rules concerning insider trading
- Market manipulation
- Federal and state “holding out” and related registration/notice concerns
- 1933 and 1934 Act public offering concerns
- Recordkeeping requirements - Rule 204-2, 17a-3 and 17a-4, and NASD Rule 3110
- Service providers



NATIONAL LABOR
RELATIONS BOARD



NATIONAL
FUTURES
ASSOCIATION®



Advertising Rule

Advisers Act Rule 206(4)-1 - General

- Social media communications generally are considered to be an advertisement
- “Advertisement” refers to any written communication addressed to more than one person that offers investment advisory services relating to securities
- Prohibition on using advertisements that contain any untrue statement of a material fact or are otherwise false or misleading

Advertising Rule

Advisers Act Rule 206(4)-1 - Testimonials

- A “testimonial” is any statement of a client’s experience or an endorsement by a client
- Depending on the facts and circumstances, third-party use of the “like” button and other features (such as the endorsement feature on LinkedIn) on the adviser’s social media sites may be considered testimonials
- Most advisers address through disclosure or by disabling or removing plug-ins

Supervision and Monitoring

Advisers Act Section 203(e)(6)

- Duty to supervise, especially with respect to communications with clients through electronic media (Rel. No. 33-7288)

Training

- All employees on prohibitions of personal use
- Pre-requisite for IAR participation

Supervision

- Governance or committee structure around social media

Monitoring

- Pre-use or post-use
- Technology solutions

Record keeping Requirements

Advisers Act Rule 204-2(a)

- Rule 204-2(a)(7). All written communications sent or received by the adviser relating to recommendations and advice, handling of funds and securities and transactions
- Rule 204-2(a)(11). A copy of each communication that the adviser circulates or distributes, directly or indirectly, to 10 or more persons

Record retention

- Framework to collect, archive and retrieve social media communications
- Technology vendors

Regulatory Considerations – Broker-Dealers

FINRA Regulatory Notice 10-06

- Communication via the Internet, including social networks, is the same as in-person or written communication
- Static postings on publicly available web sites are considered advertisements
- Participation in forums such as chat rooms, online seminars, and other such interactive electronic forums is considered a public appearance (as defined in NASD Rule 2210)

Regulatory Considerations – Broker-Dealers

FINRA Regulatory Notice 11-39

- Social media business communications where rule Rule 17a-4(b) under the Securities Exchange Act of 1934 (SEA) applies, requires broker-dealers to preserve certain records for a period of not less than three years, the first two in an easily accessible place.
- Under NASD Rule 3010, a registered principal must review prior to use any social media site that an associated person intends to employ for a business purpose.
- Firms may not establish links to any 3rd party sites that the firm knows contains false or misleading information.
- Firms must develop policies and procedures that include training regarding the difference between business and non-business communications
- A firm must be able to retain, retrieve, and supervise business communications regardless of whether they are conducted from a device owned by the firm or by the associated person.

Other Legal Considerations

- Liability for Third-party Content
 - ✓ Third-party posts are generally not considered to be firm communications
 - Entanglement – has the firm involved itself in the preparation of the content
 - Adoption – has the firm explicitly or implicitly endorsed or approved the content
 - ✓ Guidance on hyperlinks
 - ✓ Objective procedures for reviewing and deleting third-party posts
- Employee Rights Under NLRA Section 7
 - ✓ Section 7 of the National Labor Relations Act (NLRA) gives employees the right to discuss their pay and working conditions, and prohibits employers from disciplining or terminating employees for exercising such right.
 - ✓ This provision applies to nonunionized employees as well.
- State laws prohibiting employers from demanding that current or prospective employees provide their personal user names or password to social media sites.
 - ✓ Creates tension between regulatory obligations and state privacy obligations
 - ✓ NASSA request to include regulatory carve outs where social media accounts are used for business purposes

Agenda

- Social Media Basics
 - ✓ What is Social Media?
 - ✓ Why do people care about it?
 - ✓ How are firms using it?
- Regulatory Landscape
 - ✓ Regulatory Guidance
 - ✓ IA and BD Regulatory Considerations
 - ✓ Other Legal Considerations
- **Implementing a Social Media Compliance Program**
 - ✓ Policies and Procedures
 - ✓ Training and Education
 - ✓ Monitoring and Testing

Policies and Procedures – Key Questions

- What sites are you going to allow? **Note: Prohibit ≠ Prevent**
- Business or personal?
- Who is going to be reviewing/approving?
- How are you going to monitor/test?
- How are you going to maintain records?
- Are you going to allow employees to use social media for business purposes?
 - ✓ Increased time commitment for compliance
 - ✓ Potential gap in capturing client communication
 - ✓ Reputation risk and potential HR issues
 - ✓ Comment settings
 - ✓ Productivity
- Useful policy samples: <http://socialmediagovernance.com/policies.php>

Business vs. Personal Use

- Only permit authorized people to “speak” on behalf of the firm
- Require that social media communications flow through firm-sponsored sites
- Generally prohibit employees from using personal social networking sites for business purposes
 - ✓ Except for “business card” information
 - ✓ Except that firms increasingly are permitting RR/IARs to establish an account with a social networking site (LinkedIn) for business purposes, subject to appropriate controls

Policies and Procedures

1. A clear company philosophy
2. The definition of “social networking”
3. Identifying oneself (or identifiable as) as an employee of the company
4. Recommending others
5. Referring to clients, customers, or partners
6. Proprietary or confidential information
7. Terms of service
8. Copyright and other legal issues
9. Productivity impact
10. Disciplinary action

Training and Education

- Once your policy is in place, you need to make sure your employees understand it.
- This is a complex topic so there will be lots of questions.
- Use training as another tool to get more information on possible usage of social media.
 - It is likely that employees may think of usage you didn't know was possible.
 - They can help you keep on top of changes.
 - Make sure you have an "open door" policy so that they feel comfortable bringing up new questions on an on-going basis.
- Education should be a continual process as social media are a constantly moving landscape.

Monitoring the General Conversation

- Conversations are being had about you, whether you participate in social networking or not.
- “Tell 2 Friends Factor” –
 - ✓ In the past, if someone wanted to tell their friends about you (for good or bad) they probably talked to anywhere from 1-10 people on average
 - ✓ The “average” user on Facebook currently has 137 friends. And, depending on their privacy settings and the settings of all their friends, the worst case scenario has one comment being viewed by nearly 17,000 people. And that is presuming that no one passes it along.
 - ✓ Anecdotaly, an interesting experiment was conducted by a gentleman named Blair Joss. With a network of 403 connections on LinkedIn, Joss posed the question of whether people actually read LinkedIn Status Updates. Within 3 days, over 350 people had commented on his status update and over 1,700 people said they “liked” his update.
- Going Viral – Because of the number of connections people have and the ease of passing messages along, conversations can reach millions of people in a very short time.

Testing Suggestions

- Verify that all employees have provided signed acknowledgements of social networking policy
- Verify that all employees' attendance at mandatory training sessions is documented
- Review publicly-viewable content for compliance
- Internet searches of employee, company and customer names for unreported blogs or networking posts
- "Google Alerts"
- Technical solutions and developments