

Morgan Lewis

OCIE Training Session

: Social Media for Investment Advisers

**Jennifer L. Klass
Christine M. Lombardo
December 18, 2013**

www.morganlewis.com



Our Team



Jennifer L. Klass
212.309.7105
jklass@morganlewis.com



Christine M. Lombardo
212.309.6629
clombardo@morganlewis.com

Overview

- Social Media Defined
- Existing Regulatory Guidance
- Advisers Act Considerations
 - Advertising Rule
 - Policies and Procedures
 - Supervision and Monitoring
 - Record keeping
- Other Considerations
 - Business/Personal Use
 - Liability for Third-Party Content
 - Employment Law Considerations
 - State Privacy Laws

Social Media Defined

Social Media Defined

- An umbrella term that encompasses various activities that integrate technology, social interaction and content creation.
- Social media may use many technologies...



Social Media Defined

- How is social media the same?
 - Same regulatory requirements that apply to traditional media apply to social media
 - Content of the communication is determinative
- How is social media different?
 - Multi-party dialogue
 - Interactive communication in real time
 - Relationship building

How Advisers are Using Social

- Brand recognition
- Public relations
- Distribution of research publications and market commentary
- Hiring and human resources initiatives
- Practice management
- Client networking and outreach
- Business development

Existing Regulatory Guidance

Existing Regulatory Guidance

SEC

FINRA

FFIEC

NLRB

CFTC &
NFA

State Legislation

Advisers Act Considerations

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

Policies and Procedures

- Advisers Act Rule 206(4)-7
 - Policies and procedures reasonably designed to prevent violations of the Advisers Act
- Social Media Policies
 - Dedicated social media policy
 - Prior approval of social media presence and persons authorized to speak on behalf of the firm through social media
 - Content restrictions and disclosure requirements
 - Annual review and testing of policies and procedures

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

Other Considerations

Business/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

Liability for Third-Party Content

- 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

Employment Law Considerations

- 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 Privacy Laws

- 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

Selected Regulatory Guidance

Selected Regulatory Guidance

- *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)

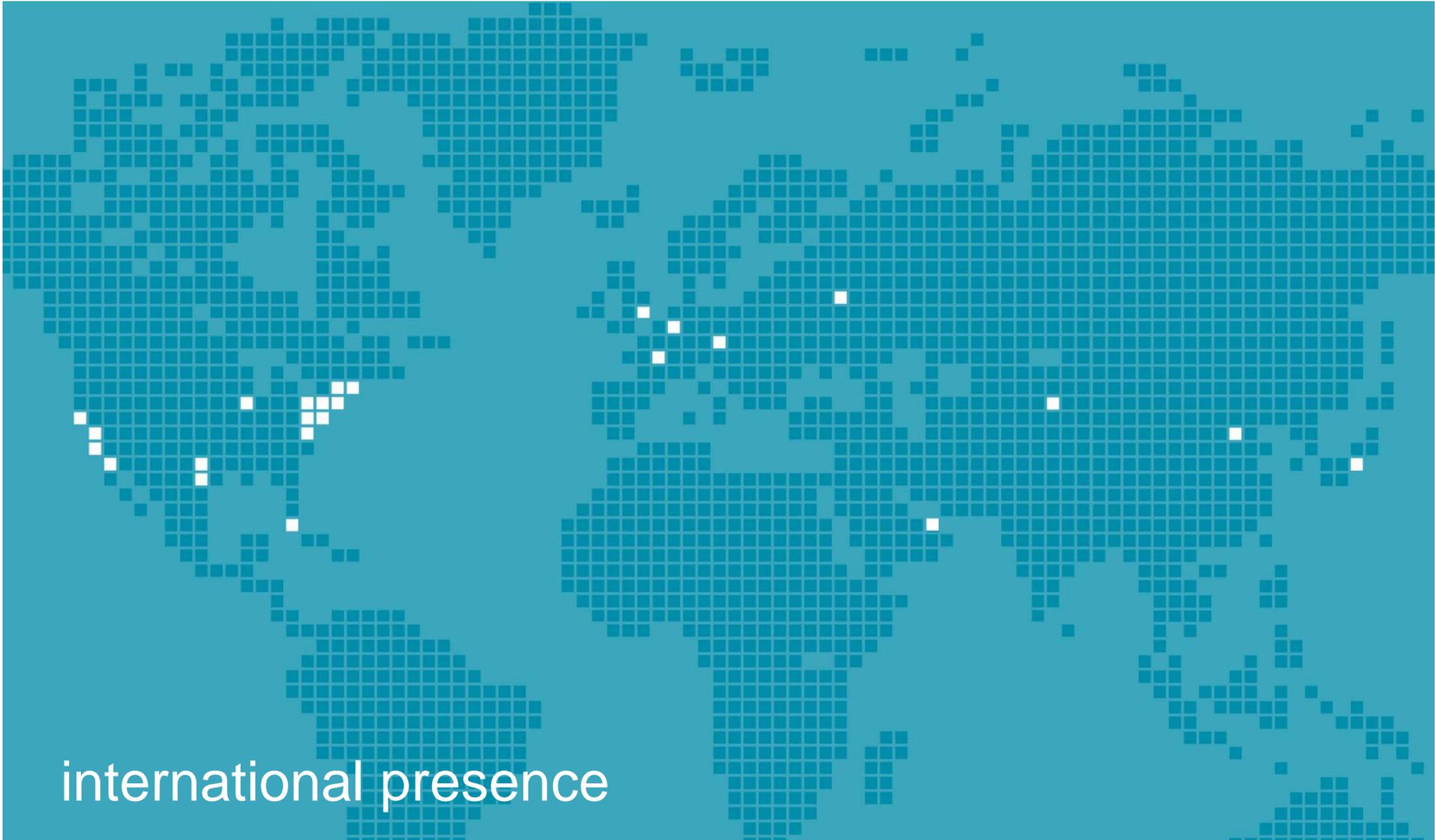
Selected Regulatory Guidance

- *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)



This material is provided as a general informational service to clients and friends of Morgan, Lewis & Bockius LLP. It does not constitute, and should not be construed as, legal advice on any specific matter, nor does it create an attorney-client relationship. You should not act or refrain from acting on the basis of this information. This material may be considered Attorney Advertising in some states. Any prior results discussed in the material do not guarantee similar outcomes. Links provided from outside sources are subject to expiration or change.

© 2013 Morgan, Lewis & Bockius LLP. All Rights Reserved.



international presence

Almaty Beijing Boston Brussels Chicago Dallas Dubai* Frankfurt Harrisburg Houston
Irvine London Los Angeles Miami Moscow New York Palo Alto Paris Philadelphia
Pittsburgh Princeton San Francisco Tokyo Washington Wilmington

*In association with Mohammed Buhashem Advocates & Legal Consultants