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Investment Adviser Use of Social Media

The Securities and Exchange Commission (the "SEC") recently released a National Examination Risk Alert (the "Alert")[1] to registered investment advisers ("RIAs") concerning their use of social media.[2]

While the staff of the Financial Industry Regulatory Authority ("FINRA") has issued guidance to its members, including those firms that provide both brokerage and investment advisory services,[3] the SEC had not directly addressed the implications under the Investment Advisers Act of 1940, as amended (the "Advisers Act"),[4] of the use of social media sites by investment advisers and their employees.[5] The Alert is the result of the SEC staff's review of the use of social media by RIAs of various sizes and strategies for compliance with federal securities laws. The Alert provides SEC staff observations concerning (i) compliance programs relating to the use of social media by investment advisers and their employees, (ii) third-party content posted to an investment adviser's social media site and (iii) recordkeeping responsibilities.

Compliance Programs

The Alert notes that investment advisers using social media "should adopt, and periodically review the effectiveness of, policies and procedures regarding social media in the face of rapidly changing technology."[6] While some investment advisers do have policies and procedures that specifically discuss the use of social media, the Alert notes that many firms have multiple overlapping procedures that apply to advertising, client communications or electronic communications generally, which may or may not address social media. The SEC staff found that these policies may cause confusion as they relate to social media. Many procedures were not specific enough as to what types of social media are permitted and many did not address the use of social media by solicitors.

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1 Office of Compliance Inspections & Examinations, SEC, National Examination Risk Alert, Investment Adviser Use of Social Media (Jan. 4, 2012), *available at* http://www.sec.gov/about/offices/ocie/riskalert-socialmedia.pdf.

2 The timing of the issuance of the Alert coincided with the SEC's announcement of administrative proceedings against an Illinois-based investment adviser charged with offering to sell fictitious securities on LinkedIn. *See* SEC Press Release No. 2012-3, SEC Charges Illinois-Based Adviser in Social Media Scam; Agency Issues Alerts on Social Media Risks for Investors and Firms (Jan. 4, 2012), http://www.sec.gov/news/press/2012/2012-3.htm.

For the text of the order, *see* Anthony Fields, Securities Act Release No. 9291, Exchange Act Release No. 66091, Investment Advisers Act Release No. 3348, Investment Company Act Release No. 29912 (Jan. 4, 2012), *available at* http://www.sec.gov/litigation/admin/2012/33-9291.pdf.

3 *See* FINRA Regulatory Notice 11-39, Social Media Websites and the Use of Personal Devices for Business Communications: Guidance on Social Networking Websites and Business Communications (Aug. 2011), *available at* http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p124186.pdf; FINRA Regulatory Notice 10-06, Social Media Web Sites: Guidance on Blogs and Social Networking Web Sites (Jan. 2010), *available at* http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p120779.pdf.

The SEC staff consulted FINRA in connection with the Alert. *See* Alert, *supra* note 1, at 1 n.1.

4 15 U.S.C. §§ 80b-1 to 80b-21.

5 *See generally* Commission Guidance on the Use of Company Web Sites, Exchange Act Release No. 58288, Investment Company Act Release No. 28351, 73 Fed. Reg. 45,862 (Aug. 7, 2008), *available at* http://www.sec.gov/rules/interp/2007/34-58288fr.pdf.

6 Alert, *supra* note 1, at 1-2.

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When evaluating the effectiveness of its compliance program with respect to the use of social media, the Alert identifies 13 "non-exhaustive" factors that an investment adviser should consider: (1) whether to implement usage guidelines that specify or prohibit certain sites and appropriate and inappropriate use of those sites; (2) content standards and restrictions (*e.g.*, investment recommendations) to avoid fiduciary duty or other regulatory issues; (3) monitoring of the investment adviser's and third-party sites on which the investment adviser's employees participate; (4) the frequency with which the investment adviser monitors such sites; (5) whether content should be pre-approved; (6) whether the investment adviser has dedicated sufficient resources to monitor social media activity; (7) whether to implement criteria for the approval of the use of specific social media sites; (8) whether to adopt specific employee training related to the use of social media; (9) whether to require employees to certify that they understand and are in compliance with the investment adviser's social media policy; (10) monitoring the functionality of each social media site used by the investment adviser's employees to determine whether content, including upgrades or modifications, creates compliance issues; (11) whether to adopt policies and procedures limiting an employee's or solicitor's ability to use personal or third-party social media sites to conduct or solicit business for the investment adviser; (12) whether the use of social media sites poses information security risks to the investment adviser; and (13) whether, in the case of an investment adviser that is part of a larger financial services or corporate entity, usage guidelines are necessary so an enterprise-wide social media site does not result in Advisers Act violations.

Third-Party Content

Some firms limit third-party postings to authorized users and prohibit postings by the general public. Other firms allow third-party postings but restrict interaction by firm personnel with third-parties. The Alert cautions that, if an investment adviser allows third-parties to make postings on its social media site (by, for example, posting messages, forwarding links or posting articles), the investment adviser should consider implementing appropriate policies and procedures and instituting reasonable safeguards to avoid a violation of the federal securities laws. The Alert specifies that, depending on the facts and circumstances, the SEC may view certain third-party content as a testimonial for purposes of Advisers Act Rule 206(4)-1(a)(1),[7] such as the use of the "like" feature on an RIA's social media site (if, for example, the "like" relates to a third-party's experience with the adviser as a client).

Recordkeeping

The Alert reminds investment advisers that certain communications made on social media sites, depending upon the content of those communications, will be subject to recordkeeping obligations pursuant to Rule 204-2 under the Advisers Act.[8] The Alert recommends that investment advisers consider the following when formulating their retention and recordkeeping policies and procedures: whether a social media communication is a required record and, if so, how long it must be retained (which must be easily accessible for at least five years); the form in which a social media communication will be retained; whether to conduct employee training; how to arrange or index social media communications that are required records; whether to conduct periodic test checking for compliance; and whether to employ third parties to retain social media communications that are required records.

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7 17 C.F.R. § 275.206(4)-1(a)(1) (2011).

8 17 C.F.R. § 275.204-2 (2011).

Conclusion

RIAs should ensure they are in compliance with all regulatory requirements and are aware of the risks associated with various forms of social media.