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## Compliance considerations for social media

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### I. Business case for investment advisor use of social media

Today, social, mobile, and web technologies are changing the way we live and work—including how consumers discover and make buying decisions regarding financial products and services. More than 40% of high-net-worth individuals under the age of 40 cite social media as important for accessing information on financial products or services, and this number keeps growing.<sup>1</sup>

As such, Registered Investment Advisors (“RIAs” or “advisors”) are increasingly using social media for business purposes, and not just for connecting with friends. Moreover, advisors are seeing the benefits of social media by finding and converting clients, improving client retention, and increasing assets under management by using social media in an effective way. The personal element unique to social networking remains important. Relevant and personal content shows who the advisor is, helps build strong, trustworthy relationships, and ultimately drives business. Moreover, social media helps advisors track important life events of their clients (new jobs, marriages, children) that may affect their investment needs.

But interpreting regulatory and compliance requirements continues to be a challenge for financial services professionals.

### II. Key rules and regulatory guidance

#### Advisers Act advertising rule

Since the 1940s, the Securities and Exchange Commission (“SEC”) has forbidden RIAs from promoting client endorsements or testimonials in anything that constitutes an “advertisement.” SEC Rule 206(4)-1 under the Investment Advisers Act of 1940 (“Advisers Act”) prohibits an RIA from publishing, circulating, or distributing any advertisement that refers, directly or indirectly, to any testimonial of any kind concerning the RIA or any advice, analysis, report, or other service rendered by the investment advisor. This is true of advertisements in print materials and advertising via electronic media such as social media. In the digital age, clients can effortlessly use social media to endorse their advisors with just a few clicks. The use of “social plug-ins” such as the LinkedIn “Endorsement” feature, “likes” on Facebook or LinkedIn, and Facebook business page star ratings could be interpreted as a prohibited testimonial under the Advisers Act.

#### Regulatory guidance

The SEC staff has issued two statements providing guidance to investment advisors about the use of social media. The first is from the [SEC’s Office of Compliance Inspections and Examinations \(OCIE\)](#), which conducts exams of SEC-registered investment advisors.<sup>2</sup> This alert outlines OCIE’s observations concerning RIAs’ use of social media and

<sup>1</sup> Capgemini and RBC Wealth Management, World Wealth Report 2014.

<sup>2</sup> Office of Compliance Inspections and Examinations, “Investment Adviser Use of Social Media,” *National Examination Risk Alert*, Vol. II, No. 1, January 4, 2012, <http://www.sec.gov/about/offices/ocie/riskalert-socialmedia.pdf>.

describes how clients can provide recommendations and endorsements. The second piece of guidance is from the [SEC Division of Investment Management](#), which issues rules governing investment advisors.<sup>3</sup> This guidance provides further clarity on investment advisors' use of third-party commentary on social media. In addition to the SEC guidance, although not directly applicable to investment advisors, FINRA has issued two useful regulatory notices on the use of social media by broker-dealers.<sup>4</sup>

One thing is clear from the guidance: An investment advisor should not invite clients to post commentary directly on the investment advisor's own social media site or webpage.

### III. Basic compliance requirements for using social media

#### Written policy and training

To reap the full benefits of social media, you must plan and account for compliance, legal, and branding issues that could put you and your company at risk if left unchecked. The first step is to develop a social media policy and provide training and education regarding that policy.

As part of their compliance programs required by the Advisers Act Rule 206(4)-7, RIAs must create and implement a written social media policy reasonably designed to prevent violation of the applicable rules. Even if advisors choose not to use social media or networking sites, the policy and procedures must still be in place.

The following are key considerations for establishing a social media usage policy:

#### Key activities for policy and training

- Implement a clear and concise written policy.
- Provide examples in your policy.
- Train employees and obtain attestation.
- Post or otherwise share policy so *employees can consult it*.
- Train new employees on policy.
- Review your policy and update as needed and required.

First, your firm should distinguish between the firm's own social media sites and sites for individual officers or employees at the firm. For the firm's own sites, there should be a clearly defined policy about who is permitted to post material and with what level of review (before or after the postings). Some advisors have only firm-level social media sites and prohibit individuals at the firm from making business-related postings on their own social media sites, although this approach is becoming less common.

Second, advisors that allow individuals at the firm to post on their social media sites must distinguish between posts meant for business-related sites and those meant for personal sites. For personal, non-business-related sites, advisors typically bar individuals from discussing business because they don't want to monitor personal communications of their employees. Indeed, some state laws prohibit firms from requiring employees to provide access to their personal social media sites. The firm would monitor and retain content only on the individual's business-related sites.

Third, your social media policy should be written in clear and concise language. A recommended route is to "state the rule" and then provide a "lay person translation of the rule" with illustrative examples of what you mean by it. Your social media policy should not only take into account the advertising rules but also factor in other important considerations, such as:

- Intellectual property (trademarks and copyrights)
- Confidential information and trade secrets
- Compliance with SEC Regulation D
- Libel, slander, and defamation issues
- Harassment and other employment issues

Finally, your social media policy should clearly define the consequences of breaking the policy and should designate roles and responsibilities within your firm for administering and enforcing the policy.

Each firm should review its policies and procedures on an ongoing basis to check for adequacy and effectiveness and to provide for training of its employees. Firms may require employees to sign an attestation certifying that they have read and understand the policy.

<sup>3</sup>Security and Exchange Commission, "Guidance on the Testimonial Rule and Social Media," *Guidance Update* No. 2014-4, March 2014, <http://www.sec.gov/investment/im-guidance-2014-04.pdf>.

<sup>4</sup>FINRA Regulatory Notice 10-06, January 2010, <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p120779.pdf>; Regulatory Notice 11-39, August 2011, <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p124186.pdf>.

## Supervision

Supervision is the key to social media compliance success, but procedures vary from firm to firm based on overall risk-based principles. The following are factors for investment advisors to consider concerning supervision.

**Specific products.** Advisors have a fiduciary duty to act only in the best interests of each individual client when recommending an investment product or service. This is difficult (if not impossible) to achieve if investment recommendations are made via social media. Most firms' policies therefore prohibit the making of recommendation via social media. Examples advisors use to help ensure compliance include:

- **Setting filters that block mentions of specific investment products or services.** This can be achieved by setting lexicons within your compliance system to filter out your firm's products and funds, stock ticker symbols, and assurances such as "guaranteed" or "free."
- **Developing a content library with compliant and engaging content.** As an alternative or complement to having advisors write their own content, firms can have the marketing and compliance teams collaborate and preload approved content into a system's content library on a periodic basis.

### **Preapproval and post-use monitoring of communications.**

Adopt procedures that preapprove static content (profile and timeline) and establish methods for post-use review of interactive content with lexicon-based search methods and sampling.

### **Adoption and entanglement with third-party content.**

Whether a third-party post is attributable to the firm depends on whether the firm has (a) involved itself in the preparation of the content ("entanglement") or (b) explicitly or implicitly endorsed or approved the content ("adoption"). It is useful for advisors to follow the rules of not preparing or endorsing such content. "Friending" a securities research analyst, tweeting an analyst's Twitter handle, or retweeting an analyst tweet about the firm or broker could be construed as "adoption" of the analyst's statements about the firm or its securities. So prohibit it!

### **Filter and block testimonials, endorsements, and recommendations.**

You can prohibit words like *recommend* and *endorse*. On LinkedIn, you can prohibit "recommendations" and "endorsements" by removing or blocking the Skills and Expertise section of the profile. To avoid entanglement with a client's comments, a prominently placed disclaimer in the summary section of an advisor's profile is prudent.

The SEC has also emphasized that it's important to think through the resource implications of social media. If you anticipate having multiple individuals with business-related social media activity, you should make sure that you have adequate supervisory and compliance resources to monitor that activity. Your policy should define when and how often you monitor content. Most firms monitor content after the fact (rather than requiring preapproval). Many firms monitor on a next-day basis, and in the fast-moving world of social media it would not be a good idea to allow monitoring less than every few days. You should also think through crisis scenarios—have a plan for how you would use social media to respond to (for example) an unexpected negative news story or to one of your postings "going viral" in an adverse way.

## Retention and retrieval

The SEC has consistently stated that an advisor must be able to retain and retrieve its social media communications, including both content from the advisor or its investment advisor representatives (IARs) and the responses to that content. SEC-registered advisors are generally subject to a five-year retention period for communications with clients and potential clients. Service providers have technology solutions that allow advisors to archive social media content and to escalate content to supervisors or compliance for review. SEC examiners almost always ask for social media as part of any examination of an advisor, so before beginning to use social media, it's essential to have in place a fully compliant technology solution for content retention and retrieval. Further, with the SEC's recent focus on cybersecurity, it's important to include social media in the firm's information security program. You don't want to be the SEC's poster child for allowing a third party to hack into your social media platforms and use them to post malicious content.

### **SEC requirements for retention and retrieval**

- Retain social media postings and responses for five years.
- Archive social media so it can be easily searched and retrieved.
- Incorporate social media in cybersecurity program.

## IV. LinkedIn endorsements and recommendations

LinkedIn endorsements and independent recommendations about the advisor's skills should be avoided because they could be prohibited testimonial advertising.

### Endorsements

An endorsement can occur in two ways: A client could endorse an advisor for a skill that is already listed on his or her profile or a client could initiate an endorsement for a new skill that does not already appear on the advisor's profile.

#### LinkedIn compliance

- Disable endorsement feature.
- Don't accept recommendations.
- Add note to profile saying you do not accept endorsements or recommendations.
- Third-party content you push out or link to may be considered your own content.

To avoid the first scenario, advisors should select "No" for the "I want to be endorsed" feature under the Skills and Expertise section on their LinkedIn profile to turn off the feature that allows clients who are LinkedIn users to "endorse" their skills. In addition, if a connection attempts to add a new skill to the advisor's profile, the advisor should reject the endorsement.

Advisors can hide endorsements that may have existed before a policy was put in place by taking the following steps:

1. Under "Skills and Expertise," click the arrow to the right of your endorser's photo.
2. In the dialogue box, click on the blue "Hide endorsement" button.

Your Skills and Expertise will remain, but the attributed Endorsement will be hidden.

## Recommendations

Recommendations on LinkedIn are completely separate from endorsements. They are free-form written opinions of others about the profiled person's professional skills, accomplishments, or experience. Recommendations may be unsolicited or posted at the request of the profiled person. If a profiled person of an advisory firm receives an unsolicited recommendation, he or she has the ability to review and approve the recommendation before it appears publicly on his or her profile. Advisors should not accept or request any recommendations on LinkedIn. They may also want to add a note to the Summary section of their profiles to say up front that they will not accept recommendations or endorsements.

## V. Social media 'likes'

### Likes by third parties

Many firms also worry about the interpretation of a "like" on Facebook or LinkedIn or about having viewers choose to "favorite" a tweet. "Likes" can mean many things. For example, a "like" from a third party may simply indicate that a visitor enjoyed an article that was shared or appreciates the artwork on a page.

Much depends on context. The 2012 SEC Risk Alert was careful to state that interpretation of a "like" as a testimonial is based on the facts and circumstances. A "like" that an advisor solicits as an indication of a client's experience with the firm may be construed as a testimonial, but a "like" on a photo of an advisor's new baby may not. The 2014 SEC Guidance distinguished between social media content on a firm's own site (which is likely to be considered testimonial) and content on third-party social media sites, which, so long as the firm is not able to "cherry-pick" only favorable content, should not be considered improper. FINRA's guidance (which applies directly only to broker-dealers but is useful for investment advisors) indicates that content generated by third parties should not be considered the firm's own content and thus should not be considered the firm's advertisement in the first place, unless the firm has adopted or become entangled in that third-party content.

Not all "likes" are a compliance problem, so it isn't necessary to block the button entirely.

## Advisor ‘likes’ of others’ content

Because a “like” could be construed as an endorsement or entanglement in third-party content under some circumstances, many firms have come to the conclusion that regulations require them to block representatives from “liking” posts on Facebook and LinkedIn or “favoriting” tweets on Twitter.

The regulators’ concern is that activation of the “like” button amounts to an endorsement of some product, person, or service, or to “adoption” of third-party content such as an article. But would they really consider it inappropriate if an advisor “likes” a picture of her granddaughter or her favorite sports team’s page? Depending on the facts and circumstances, the use of social plug-ins, such as the “like” feature, might be construed as a testimonial or as the “adoption” or endorsement of third-party content. In a footnote, the SEC stated that some social media sites do not permit an advisor to disable the “like” button or a similar feature. The firm should therefore develop a system to monitor these sites and remove third-party postings if necessary.

## VI. Links to third-party sites

The March 2014 SEC guidance (IM Guidance No. 2014-4) also clarifies how advisors can use third-party commentary on social media. This guidance provides advisors with more leniency for use of client commentary that appears on independent third-party social media websites. According to the guidance, advisors should not link to commentary on a third-party social media site unless they can demonstrate all three of the following:

- That the advisor has no ability to affect which public commentary is included or how the commentary is presented on the independent social media site
- That the commentator’s ability to comment is not restricted
- That all comments, both good and bad, can be viewed publicly

The SEC made clear that as long as client reviews appear on independent social media or review sites and the advisor has no ability to “cherry-pick” which public commentary is included or how the commentary is presented, the mere reference to such commentary does not violate the rule on testimonials.

For example, it is permissible for an advisor to link from his or her social media page to reviews on public sites like Yelp or Angie’s List. But the third-party site must allow the public to see all commentary about the advisor—both good and bad—and such commentary should not be filtered in favor of the advisor.

It remains the case that advisors should have no influence on third-party commentary. This guidance clarifies that commentary should not be displayed on social pages or profiles that could be edited by the advisor. For example, an advisor should not accept reviews from clients on a webpage that the advisor owns because in that case the advisor would be able to control the content.

The March 2014 guidance also clarifies how the SEC considers non-investment-related content in advertisements. In contrast to prior interpretations, this makes clear that non-investment-related commentary in an advertisement, such as comments on religious affiliation or community involvement, cannot be considered a violation of Rule 206(4)-1(a)(1). The SEC also addresses client lists in relation to social media friends or fans. According to the guidance, it should not be clear from an advisor’s social media page or profile who are clients and who are friends or other connections. For example, they should not have a Twitter list called “Clients.” And the social media property should not imply that the contacts or friends have experienced favorable results from the advisor’s services.

Although this guidance provides clarity for advisors’ use of third-party commentary on their social media sites, some firms elect to continue to require all content on social media to be preapproved before it is published.

## VII. Other site-specific issues

### Twitter and character limits

Twitter postings are limited to 140 characters, which severely limits the amount of disclosure an advisor can make, even with a hyperlink. As a result, many advisors simply do not discuss investments or their services on Twitter because it’s simply not feasible to include sufficient disclosure to satisfy a regulator.

Sophisticated social media users generally do not repeat the same content in every channel; they have different (but complementary) messages tailored to different social media platforms. Retweeting the Twitter postings of third parties also has risks—a regulator would likely find that you have, as discussed above, “adopted” the content of that third party. So before you “retweet,” make sure the content meets the standards you would apply to your own content. Advisors should avoid retweeting any tweet from either a securities research analyst or a client who is providing a testimonial about the advisor’s performance or a product or service of its firm.



## Facebook business page ratings

Facebook business pages have a five-star rating system that allows users to rate and review a professional's Facebook business page. These ratings can be made by any user, which means users do not have to demonstrate that they know the professional or are customers. Facebook's star ratings feature could therefore be deemed a "testimonial" under the Advisers Act. RIAs with a Facebook page should not accept ratings or reviews on the social network.

Facebook has not made it possible to block this new ratings feature, but RIAs can use a work-around to prevent their page from receiving star ratings. This work-around requires the advisor to remove the map of business location by following these steps:

1. On your business page, go to the About section under the logo.
2. On the next page, hover over the About section and click "Edit."
3. To the right of the Address section, click "Edit."
4. Uncheck the box underneath the map that says "Show this map on your page and enable check-ins."
5. Click "Save Changes."

Please note that by doing so the map of the business location will not appear on the business page.

## VIII. Conclusion

Investment advisors can use social media to promote their businesses and keep in contact with their clients. The fundamental compliance issues for an effective social media presence include:

- Establishing a social media policy (including employee training on that policy)
- Deciding how to supervise social media
- Creating the right infrastructure to store and retrieve social media

When using social media, advisors must avoid presenting or allowing content that could be considered testimonial advertising and should think carefully before "adopting" or becoming "entangled" in third-party content. The following are ways to limit potential compliance problems:

- Do not list any skills on your LinkedIn profile.
- Turn the LinkedIn endorsements feature off.
- Do not accept any LinkedIn endorsements initiated by a third party.
- Include a disclaimer on your LinkedIn profile advising third parties not to endorse.
- Share links only to independent third-party social media sites on whose third-party commentary you have no influence and with which you are not materially entangled on the third-party social media site.
- When linking to a third party's site, do not cherry-pick favorable comments. If you link to a third party's site that has commentary about your firm, the site has to show the good and the bad commentary, not just the favorable comments.
- In general, advisors should avoid soliciting client feedback in a way that may frame a Facebook "like" or a third-party post as a testimonial.
- Even on third-party websites, be careful when responding to comments so that you are not deemed to have "adopted" those comments.
- Adopt neutral content guidelines. For example: no defamatory language, threats, infringement of intellectual property, spam, racially offensive comments, or profanity.
- Finally, as a best practice to limit risk, advisors should prominently display language on their LinkedIn and Facebook profiles indicating that they (and their firms) are not responsible for and do not encourage third parties to post anything on their behalf.

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