POLICY STATEMENT

GUIDANCE ON THE USE OF SOCIAL MEDIA BY INVESTMENT ADVISERS
DECEMBER 2019

Background

Investment advisers ("advisers") increasingly use social media for different business purposes, such as promoting their services or interacting with existing and prospective clients. An adviser with a social media presence can potentially reach a wider audience while expending fewer resources than was possible in years past. In fact, social media is generally designed to incentivize connections to others – making it arguably more attractive than an individual firm's website for that purpose. As a result, the potential harm from regulatory violations is magnified by the widespread use of social media.

In 2011, the Massachusetts Securities Division (the "Division") sent a survey to 576 Massachusetts registered investment advisers located in the state to understand their social media use. The results of the survey (the "Survey") were published on the Division's website on July 6, 2011 and contain the compiled responses of 79% of those advisers. The Survey indicated that 44% of state-registered investment advisers utilize at least one form of social media, most significantly LinkedIn (41%), Facebook (14%), and Twitter (8%).

The Survey suggested that investment advisers using social media for business communications may not have implemented sufficient recordkeeping systems and/or supervisory and compliance procedures to monitor the use of the websites, blogs, and other media outlets. Based on the results of this analysis and current regulatory requirements, the Division is providing the following guidance as to how recordkeeping and other compliance requirements relate to advisers' use of social media.

Can an investment adviser use social media to discuss its business?

Yes. Using social media to communicate with existing or potential clients does not violate Massachusetts investment adviser rules or regulations. However, advisers should be aware of the regulatory requirements that restrict or condition their social media use.

Is Social Media Advertising?

A publicly-accessible social media account is generally considered advertising of the adviser.[1] However, whether social media content constitutes advertising is based upon a review of the particular facts and circumstances. As a general rule, social media accounts –such as Facebook or LinkedIn– maintained by an adviser are considered advertising if the account is created or maintained in the name of the adviser or contains business-related content of the firm or solicitations for advisory services. Many state-registered advisers are sole proprietors that discuss the services provided in independent accounts in the name of the representative of the firm. These accounts may also be considered advertising of the firm.

What are the advertising rules that apply to an adviser's social media use?

Social media uses that are deemed advertising of the adviser are subject to the same regulatory requirements as other forms of advertising, including recordkeeping requirements and the prohibition of

[1] This is also true of social media accounts maintained by investment adviser representatives of the firm when the accounts are used at least in part to advertise investment advisory services.

false or misleading statements. 950 CMR 12.205(7).[2] Unlike other types of advertising, however, there are issues unique to social media content that advisers should consider, as discussed below in more detail.

What are the social media disclosure requirements of Form ADV?

As of Oct 1, 2018, Form ADV Part 1A, Item 1I, requires advisers to indicate whether they have websites or accounts on publicly available social media platforms. Item 1I directs advisers to list on Section1I of Schedule D all the addresses of the firm's accounts on publicly available social media platforms whose content is controlled by the adviser –including, but not limited to, Twitter, Facebook, and LinkedIn. If a website address serves as a portal through which to access other information published on the web, the adviser may list the portal(s) alone. Individual addresses of employee emails or accounts need not be provided.

What are the recordkeeping requirements for social media advertising?

The Division reminds advisers that they are regulated by the books and records requirements under 950 CMR 12.205(7)(a)(1), which incorporates Rule 204-2 of the Adviser's Act ("Rule 204-2") [17 CFR 275.204-(2)]. Among other things, advisers shall maintain and preserve books and records relating to their investment advisory business in an easily accessible place for a period of not less than five years, the first two years in an appropriate office of the investment adviser.[3] Additionally, advisers must maintain a correspondence file or log identifying all correspondence disseminated to or received from clients or prospective clients in connection with the business of the investment adviser under Massachusetts recordkeeping requirements.[4]

Interactive sites that are subject to constant change raise special recordkeeping complications. While the Division does not recommend or attest to the sufficiency of any one service or manner of recordkeeping, we are aware that technology providers currently offer advisers assistance in addressing recordkeeping requirements related to social media content.[5]

When is an adviser responsible for content posted on its social media accounts?

Advisers are responsible for content that they or their representatives author on the advisers' accounts and must follow all the requirements related to such content.[6] Generally, content authored by clients or other parties do not constitute communications with the public. However, an adviser may be responsible for content authored by a third-party if the adviser (a) paid for or was involved in the creation of the content ("entanglement") or (b) explicitly or implicitly endorsed the content ("adoption"). Entanglement and adoption have been discussed with respect to social media by the SEC and the Financial Industry Regulatory Authority.[7]

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[2] *See also*, Investment Adviser Use of Social Media, National Examination Risk Alert, Office of Compliance Inspections and Examinations, SEC, Vol. 1, Issue 1 (Jan. 4, 2012).

[3] 17 C.F.R. 275.204-2(e)(3)(i); Mass. Code Reg. 12.205(7)(c).

[4] 950 CMR 12.205(7)(a).

[5] Social media advertising must be maintained in a manner allowing for easy access for reasonable periodic, special, or other examinations by the Division staff. Copies can be retained in either paper or electronic form. 950 CMR 12.205(7)(b)-(c).

[6] *Regulatory Notice 10-06* FINRA 3 (January, 2010) http://www.finra.org/sites/default/files/NoticeDocument/p120779.pdf.

[7] The FINRA notices relate only to FINRA member broker dealers. *See Regulatory Notice 11-39* (August, 2011); *Regulatory Notice 10-06* (January, 2010); Regulatory Notice 17-18 (2017). For additional guidance on the entanglement and adoption theories, see *Commission Guidance on the Use of Company Web Sites*, SEC Release No. 34-58288 (Aug. 1,

Whether third-party content is entangled with or adopted by the adviser depends on the particular facts and circumstances, for instance:

- Linked information. Users of social media often introduce hyperlinks to third-party sites. An adviser may be responsible for linked content if the adviser knows or has a reason to know that the content includes false or misleading information. Further, an adviser is accountable for linked content through adoption and entanglement.
- Selectively Removing Content. An adviser that uses social media and that selectively deletes third party material unfavorable to the adviser while continuing to display favorable content may be deemed to adopt the remaining content. Advisers are cautioned to develop and periodically review policies and procedures regarding third-party content and criteria for content removal.
- "Liking" or "Sharing" Content. An adviser that "likes" or "shares" third-party content adopts such content.[8] However, an adviser does not adopt content that is linked to the third-party content if the adviser does not have control over the linked content, unless the "liked" or "shared" content serves primarily as a vehicle for links or represents the entire basis of the content.
- Solicited Recommendations on LinkedIn. LinkedIn by default allows users to solicit others for recommendations. Such recommendations are posted on the user's LinkedIn profile. Recommendations are likely to be considered entangled with the adviser and, depending on the identity of the author, they may constitute impermissible testimonials (see below).
- Influencers. Firms should identify and address as advertisements any communications by influencers, whether in the form of comments or posts, which include the firm's name.[9]

What other rules relate to social media advertising?

As advertising, an adviser's social media accounts are subject to certain restrictions outlined in the Regulations, including the following:

- Advisers must ensure that any advertised content is not misleading and does not misrepresent the qualifications of the adviser, its representatives, or any employees, or the nature of the advisory services being offered or fees charged for such services.[10]
- Advisers may not provide a report or recommendation to any client prepared by someone other than the adviser without disclosing that fact.[11]
- Advisers may not guarantee a client that a specific result will be achieved as a result of the advice rendered.[12]
- Advisers may not disclose the identity, affairs, or investments of any client to any third party unless required by law to do so, or unless consented to by the client.[13]
- Advisers should avoid recommending specific investment products during interactive communications unless a registered principal has preapproved the content or the content

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2008) 73 FR 45862, 45870 (Aug. 7, 2008) (the "2008 Release"). The Division endeavors interpret the Act and the Regulations consistent with federal interpretation of the federal securities laws and regulations where possible. MGL Ch. 110A §415.

[8] *Regulatory Notice 17-18,* FINRA 6 (April, 2017) https://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-17-18.pdf.

[9] *Id.*

[10] 950 CMR 12.205(9)(c)8.

[11] 950 CMR 12.205(9)(c)9.

[12] 950 CMR 12.205(9)(c)11.

[13] 950 CMR 12.205(9)(c)13.

conforms to a preapproved template and the specific recommendation has been approved by a registered principal.[14]

- Advisers must take care to ensure that advertising is done in compliance with Rule 206(4)-1 under the Advisers Act ("Rule 206(4)-1").[15]

What are the social media restrictions regarding testimonials?

Investment advisers are prohibited from engaging in fraudulent, deceptive, or manipulative conduct, which includes the direct or indirect publishing, circulation, or distribution of advertisement that refers to any testimonial concerning the adviser or any advice, analysis, report, or service by such adviser.[16] Whether social media publications are testimonial depends on the particular facts and circumstances.

The SEC has stated that public commentary made directly by a client regarding their personal experience or endorsing an adviser, as well as a statement by a third party regarding a client's experience or endorsing of an adviser, may be testimonial.[17] Nonetheless, an adviser may publish an article by an unbiased third party regarding the adviser's performance if the article excludes clients' statements or endorsements of their experiences with the adviser.[18] The content of the third party site must be included in its totality, must remain unedited, and must be independent of the adviser.[19] For more information on social media and testimonial statements, review the SEC's Investment Management Guidance on the Testimonial Rule and Social Media at https://www.sec.gov/investment/im-guidance-2014-04.pdf.

If a client or former client "Likes" my Facebook page or "Recommends" me on LinkedIn, is that a testimonial?

A testimonial is generally understood as a statement by a client or former client that endorses the adviser or otherwise presents a favorable experience of the adviser. Testimonials are prohibited because they may suggest that all of the adviser's clients or investors have the same favorable experience as described in the testimonial.[20]

Not all content on an investment adviser's social media account is under the control of the adviser. For example, Facebook's "Like" button is a "plug-in" that may not be removable from the adviser's account. The Division agrees with SEC guidance that states that, depending on the facts and circumstances, a client "Liking" an investment adviser's account could be considered a forbidden testimonial if it explicitly or implicitly includes a statement of a client's experience with the adviser.[21]

However, the Division's position is that a client's "Like" of an adviser's Facebook page – without more – does not constitute a testimonial. As described above, the purpose of the testimonial prohibition is to avoid the mistaken impression that the experience of one client is likely to be achieved in the reader's

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[14] *Regulatory Notice 10-06*, FINRA 4 (January, 2010) http://www.finra.org/sites/default/files/NoticeDocument/p120779.pdf.

[15] 15 U.S.C. § 80b-6; 17 C.F.R. § 275.206(4)-1(a). Rule 206(4)-1 is incorporated by reference into the Regulations. See 950 CMR 12.205(9)(b)(1).

[16] *IM Guidance Update: Guidance on the Testimonial Rule and Social Media*, Securities and Exchange Commission, (March, 2014) https://www.sec.gov/investment/im-guidance-2014-04.pdf.

[17] *Id*. at 2.

[18] *Id*.

[19] *Id*.

[20] Client testimonials are expressly prohibited by Rule 206(4)-1.

[21] *IM Guidance Update: Guidance on the Testimonial Rule and Social Media,* SEC 2 (March, 2014), https://www.sec.gov/investment/im-guidance-2014-04.pdf.

particular circumstances. Facebook "Likes" by themselves are not likely to give rise to such a mistaken impression. In contrast, the Division's position is that there is a presumption that a client recommendation posted on an adviser's LinkedIn account is a prohibited testimonial. As a best practice, advisers should consider a policy to restrict the public posting of client recommendations to their LinkedIn profile.[22]

Of course, this analysis is guided by particular facts and circumstances. For example, an adviser that suggests on its account that the number of "Likes" received is evidence of its abilities may run afoul of securities laws. Similarly, LinkedIn recommendations that are clearly not from existing or former clients may be acceptable provided the information is not in any way misleading.

What other advertising rules should be given particular attention before using social media?

Performance Reporting

The Division has identified instances in which advisers have used social media to communicate performance reporting of the adviser in the form of a composite or model portfolio. Advisers are reminded that performance advertising is subject to specific restrictions under Rule 206(4)-1 and should consider the appropriate medium for disseminating this type of data.[23] For example, social media sites with character limits such as Twitter may be an inappropriate medium for performance advertising because of particular challenges to full and fair disclosure of all material information.

"Cherry Picking" Past Recommendations

Advertising that directly or indirectly refers to the adviser's past specific profitable recommendations are prohibited unless the adviser sets out a list of all recommendations made by the adviser within the last one year period. While there are exceptions to this rule, these are conditioned upon the delivery of specific disclosures.[24]

The Division has identified specific instances in which an investment adviser routinely listed security-specific past recommendations on a medium similar to Twitter called "Stock Twits." The Division cautions that such discussions may be inappropriate because, as discussed above, Twitter messages are limited to 280 characters and present particular challenges to full and fair disclosure of all material information.

Supervision

Advisers are required to establish and maintain a system to supervise the activities of each investment adviser representative and other employees that is reasonably designed to achieve compliance with state and federal securities laws.[25]

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[22] In analyzing the differences between Facebook "Likes" and LinkedIn "Recommendations", the Division considered (among other things) the following criteria:

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 of a favorable description of the adviser.

[23] For more information on performance reporting *see Clover Capital Management., Inc*. SEC No-Action Letter, 1986 WL 67379, Fed. Sec. L. rep. (CCH) ¶ 78,378 (October 28, 1986) and its progeny.

[24] *See The TCW Group, Inc., SEC No-Action Letter,* 2008 WL 4878097 (pub. Avail. Nov. 7, 2008).

[25] *See* 950 CMR 12.205(10).

The Securities and Exchange Commission's guidance on "Investment Adviser Use of Social Media"[26] provides considerations for the social media compliance programs of federally-registered investment advisers. Certain recommendations are equally applicable to state-registered advisers, including: 1) usage guidelines as to proper and improper use of social media by investment adviser representatives; 2) content standards; 3) the manner and frequency with which an adviser will monitor social media websites; 4) whether investment adviser representatives must have social media content approved prior to public posting; 5) criteria for determining which social media or networking websites may be used by the firm and its representatives; 6) whether to train investment adviser representatives on compliant use of social media; and 7) certification requirements. Please see the SEC guidance for more details.

How can advisers enhance their social media compliance?

- An adviser may establish guidelines that restrict the types of permitted publications by the adviser or solicitors, such as restricting business-related postings to official business accounts (*e.g.* the adviser's Facebook or Twitter accounts), outlining the types of permitted or restricted content (*e.g.* prohibiting recommendations), and designating personnel for approving or publishing social media content.
- An adviser may prohibit employees from posting business-related content on their personal or third-party accounts.
- An adviser may consider using periodic, daily, or real-time monitoring of social media content, determined by the extent of the adviser's social media use and the nature of its publications.
- An adviser may consider providing training to all employees regarding its social media policies.

How can an adviser enhance its social media compliance with respect to third party content?

- An adviser should review its social media presence on a periodic basis and ensure that any content that could be considered non-compliant is removed or hidden from view promptly. Daily reviews would be considered a reasonable, and less frequent reviews may be reasonable depending upon the traffic of the site and the type of social media site (*i.e.* Twitter vs. LinkedIn).
- An adviser should be aware of the potential issues associated with adoption and entanglement. Many of these potential issues can be mitigated by avoiding the solicitation of third-party content or linking to third-party content that the adviser has not thoroughly reviewed.
- An adviser should consider including disclosures on its social media accounts that address the adviser's views of third-party activities on its accounts, specifying that the advisor does not adopt third-party content. For example, on Facebook, an adviser could display the following: "**"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].**"
- Social media may contain functions designed to facilitate recommendations or endorsements that can be disabled or removed from public view without disabling the account. In cases where the adviser can proactively block or disable content that is designed for a purpose at odds with regulatory requirements, the adviser should consider proactively blocking the content.

Effective December 2019.

[26] *See* "National Examination Risk Alert: Investment Adviser Use of Social Media" (January 4, 2012).