

**TO: Massachusetts Registered Investment Advisers**  
**FROM: The Massachusetts Securities Division**  
**RE: The Use of Social Media by Investment Advisers**  
**Date: January 18, 2012**

## **Background**

Earlier this year, the Massachusetts Securities Division (the “Division”) sent a survey to the 576 Massachusetts registered investment advisers located in the state (“advisers”). The results of the survey (the “Survey”) were published on the Division’s website on July 6, 2011 and contained 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 such as Facebook, LinkedIn, or Twitter. Moreover, the survey revealed that more advisers intended to use social media within the next year. Most investment advisers using a social media website used LinkedIn (41%), Facebook (14%), or Twitter (8%).

The Survey suggests that investment advisers are increasingly interested in utilizing social media to reach out to existing and prospective clients. However, the survey also suggested that investment advisers using social media sites for business communications may not have implemented sufficient recordkeeping systems and/or supervisory and compliance procedures to monitor the use of the web sites, blogs and other media outlets. Based on this analysis, the Division is providing the following guidance as to how record retention and other compliance requirements relate to advisers’ use of social media.

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

Yes. Using this relatively new medium for communicating with existing or potential clients does not violate Massachusetts investment adviser rules or regulations. However, advisers should recognize there are regulatory requirements that exist. Further, social media websites differ from other forms of communication and can pose new issues to consider from a regulatory or compliance perspective.

### ***Why care about social media?***

Some advisers believe that social media represents a “new age” of interaction and communication with other professionals and with existing or potential clients. An adviser with a social media presence can potentially reach a far 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 present on social media websites is magnified because of the potential for a much wider audience.

### ***Is Social Media Advertising?***

Generally yes. Whether a web page is advertising is based upon the facts and circumstances. However, as a general rule, web pages maintained by an adviser on a social media website like Facebook or LinkedIn will be considered advertising if the page 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 and may not create a page in the name of the advisory firm, but may discuss the services provided in independent webpages in the name of the representative of the firm. These webpages may also be considered advertising of the firm.

### ***What are the advertising rules that apply to an adviser's social media web pages?***

Social media web pages that are deemed advertising of the adviser are subject to the same regulatory requirements as other forms of advertising. This includes recordkeeping requirements and the typical restrictions that apply to all types of advertising, such as the bar on testimonials and misleading statements. Unlike other types of advertising, however, there are particular issues unique to social media content that advisers should consider prior to use, as discussed below in more detail.

### ***What are the recordkeeping requirements for social media advertising?***

A social media webpage would likely be considered advertising of the adviser provided the website is accessible to the general public.<sup>1</sup> The Division reminds advisers that among other things, they are required to maintain the same books and records required to be maintained by an Securities and Exchange Commission (“SEC”) registered adviser under Adviser’s Act rule 204-2 (“Rule 204-2”).<sup>2</sup> Among other things, Rule 204-2 requires the adviser to retain advertising. Additionally, Massachusetts has other recordkeeping requirements including that the adviser maintain a correspondence file or log.

Because of the interactive portions of social media web pages, such pages are constantly subject to change. This raises additional complications to consider in determining a method for record retention. 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.<sup>3</sup>

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<sup>1</sup> This is also true of social media websites maintained by investment adviser representatives of the firm when the site is used at least in part advertise investment advisory services.

<sup>2</sup> 950 CMR 12.205(7)(a); 17 CFR 275.204-(2)

<sup>3</sup> Social media advertising must be maintained in a manner allowing for easy access for reasonable periodic, special or other examinations by Division staff. Copies can be retained in either paper or electronic form but must be maintained and preserved for a period of not less than five years, the first two years in an appropriate office of the adviser. 950 CMR 12.205(7)(b)-(c)

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

Advisers are responsible for content that they or their representatives author on their webpage. An adviser may also be responsible for content it did not author if the adviser has some responsibility for its creation (entanglement) or has somehow endorsed it (adoption) after the content was created. If an adviser is responsible for advertising content on a social media webpage, the adviser must follow all necessary rules related to such content.

***What is entanglement and adoption?***

“Entanglement” generally means the adviser has in some way been involved in the content’s creation or preparation. Adoption generally means the adviser has in some way explicitly or implicitly (through its actions) approved or endorsed the content after it was created. Advisers will be held responsible for the substance of content that it is entangled with or which the adviser has adopted.

Entanglement and adoption have been discussed with respect to company websites by the SEC, and with respect to social media websites by the Financial Industry Regulatory Authority.<sup>4</sup> The concept is equally usable in the investment advisory context.

Of course, whether particular third party content is entangled with or adopted by the adviser is contextual and will depend on the particular facts and circumstances.

Examples may include:

- **Linked information.** Users of social media often create hyperlinks to other content. Twitter is particularly prone to short links to other posts or “retweets”. Such links without context as to why the link exists could imply the adviser approves of or endorses the linked content.
- **Selectively Removing Content.** An adviser that uses a social media website, and that selectively deletes third-party material unfavorable to the adviser but continues to display favorable content, may be deemed to adopt the remaining content. Advisers are cautioned to develop policies and procedures that maintain a schedule for review of third party posted content and, if the adviser chooses to remove content, criteria for removal.

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<sup>4</sup> The FINRA notices relate only to FINRA member broker dealers. See *Regulatory Notice 11-39* (August, 2011); *Regulatory Notice 10-06* (January, 2010). 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, 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.

- **“Liking” Facebook or non-Facebook content.** An adviser that “Likes” comments or web pages should be cognizant of what content may then be displayed on its own social media web page or news feed.
- **Solicited Recommendations on LinkedIn.** LinkedIn webpages by default allow the user to solicit others for recommendations. Such recommendations are then posted to the user’s LinkedIn profile. Any recommendations that are received are likely to be considered entangled with the adviser. Further, dependant upon the author, they may constitute impermissible testimonials (see below).

If an adviser is responsible for the content posted on their social media website, either because they authored it or because they have adopted or are entangled with it, the adviser is responsible for that content.

***What other rules relate to social media advertising?***

As advertising, an adviser’s social media webpage is subject to certain restrictions outlined in the Regulations. Advisers must ensure that any advertising is true, does not misrepresent the qualifications of the employee or the nature of advisory services being offered, and is not misleading.<sup>5</sup> Advisers must also take care to ensure that advertising is done in compliance with Rule 206(4)-1 under the Advisers Act (“Rule 206(4)-1”).<sup>6</sup>

***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.<sup>7</sup>

Not all content on an investment adviser’s social media page is under the control of the investment adviser. The “Like” button is a “plug-in” on Facebook that may not be removable from the adviser’s Facebook webpage. The Division agrees with recent SEC guidance that states that, depending on the facts and circumstances, a client “Liking” an investment adviser’s webpage *could* be considered a forbidden testimonial.<sup>8</sup>

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 of a reader that the experience of one client is likely to be achieved in the reader’s 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

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<sup>5</sup> 950 CMR 12.205(9)(c)(8)

<sup>6</sup> Rule 206(4)-1 is incorporated by reference into the Regulations. See 950 CMR 12.205(9)(b)(1).

<sup>7</sup> Client testimonials are prohibited explicitly in Rule 206(4)-1.

<sup>8</sup> See “National Examination Risk Alert: Investment Adviser Use of Social Media” (January 4, 2012).

recommendation posted on an adviser's LinkedIn page 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.<sup>9</sup>

Of course, other circumstances could change this analysis. For example, an adviser that suggests on their webpage that the number of "Likes" received is evidence of their ability as an investment adviser 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 utilized social media to communicate performance reporting of the adviser in the form of either a composite or model portfolio. Advisers are reminded that performance advertising is subject to specific restrictions under Rule 206(4)-1.<sup>10</sup>

Advisers should consider the appropriate medium for disseminating this type of data. For example, certain social media websites such as Twitter may be an inappropriate medium for discussion of performance advertising because of Twitter's 140 character limit presents particular challenges to full and fair disclosure of all material information.

#### "Cherry Picking" Past Recommendations

Advertising that directly or indirectly refer 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 general rule, the exceptions are conditioned upon specific disclosures being given.<sup>11</sup>

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

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<sup>9</sup> 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.
5. Whether the "Like" or "Recommend" function provides any function outside of a favorable description of the adviser.

<sup>10</sup> 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.

<sup>11</sup> See *The TCW Group, Inc.*, SEC No-Action Letter, 2008 WL 4878097 (pub. Avail. Nov. 7, 2008).

because, as discussed above, Twitter messages are limited to 140 characters and presents particular challenges to full and fair disclosure of all material information

***What kind of things can an Adviser do enhance the compliance of its social media page(s) with respect to third party content?***

- An adviser should continue to 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. A review done daily would be considered a reasonable supervision of the adviser's social media site. Less frequent reviews may be reasonable depending upon the traffic on the site and the type of social media site (i.e. Twitter vs. LinkedIn).
- An adviser should be cognizant of the potential issues associated with adoption and entanglement. Advisers can avoid many of these potential issues by not soliciting third party content on their website nor linking to third party content that they have not thoroughly reviewed.
- An adviser should consider a disclosure on social media pages depending on the circumstances. 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].”**

Similar disclosures could be developed for other forms of social media or to clarify that the adviser is not adopting content.

- Some social media contains functions designed to facilitate recommendations or endorsements that can be disabled or removed from public view without disabling the website entirely. 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.

**Supervision**

Investment 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.<sup>12</sup>

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<sup>12</sup> See 950 CMR 12.205(10).

The Securities and Exchange Commission recently released guidance on “Investment Adviser Use of Social Media.”<sup>13</sup> While the release is targeted towards federally registered investment advisers, many of the factors outlined as areas to consider in developing a social media compliance program are equally applicable to state registered advisers. These factors include: 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.

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<sup>13</sup> See “National Examination Risk Alert: Investment Adviser Use of Social Media” (January 4, 2012).