Today's Social Media Challenges: What Compliance Professionals Need to Know

By Michelle L. Jacko

Introduction – What is Social Media and How is it Used By Financial Advisors?

The world – and potentially the way we conduct business – is changing because of social media. Former colleagues and old friends are able to reconnect easily through the help of Facebook, LinkedIn and Twitter. In the professional realm, peers, referral resources and potential clients are now readily accessible because of social media. Instead of passing out fliers or networking at the country club, social media provides an effective, efficient means for financial institutions to expand their reach to new opportunities and connections.

Social media is broadly defined as any form of electronic communication that includes websites and microblogging, such as LinkedIn, Facebook and Twitter, through which users create online communities by integrating technology with social interaction and content creation to share information, ideas, messages, and other Internet content (such as videos).[1] As of December 2012, 67% of adults operating online used social networking sites.[2] Of these people, approximately 67% used Facebook, 16% used Twitter and 20% used LinkedIn.[3] Of those financial advisors who used social media for business, 90% used LinkedIn, while less than 30% used Facebook, Twitter or Google+.[4]

Naturally, social media site usage by businesses as a method of communicating with customers is growing significantly. In 2012, 73% of Fortune 500 companies reported using a corporate Twitter account, while 66% have a corporate Facebook page.

There is a variety of reasons for this trend. Social media provides a cost effective means to build a brand, obtain wider and faster distribution of news and information, and enhance search engine optimization (SEO) to effectively market products and services. Importantly, it also represents a means to reach customers through interaction, networking and solicitation efforts. As new business comes from social media outlets, sales and marketing emphatically stress the need to increase the firm's social media usage. Moreover, clients like social media because it is an informal, yet personal means to communicate. Social media makes it easy to introduce and make referrals, as well as maintain continuous contact with your customer base at any time.

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The use of social media is at an all-time high by businesses, including broker-dealers, investment advisers and investment companies alike. The benefits of utilizing social media platforms are considerable. Social media allows advisers the ability to deepen their relationships with existing clients, acquire new clients and gain valuable referrals. These platforms provide greater access to a larger marketplace and they are steadily becoming, for the investor, ripe forums through which they may vet their financial advisors.

However, there are several regulatory and business considerations that must be evaluated by financial firms when using social media. First, the firm must determine what securities regulations may apply to social media usage, including advertising rules. For investment advisers, an advertisement is broadly defined to include any written communication addressed to more than one person, or any notice or other announcement in any publication or by radio or television that offers any investment advisory service.[5] For broker-dealers, an advertisement is defined as any material, other than an independently-prepared reprint and institutional sales material, that is published or used in any electronic or other public media, including any website, newspaper, magazine or other periodical, radio, television, telephone or tape recording, videotape display, signs or billboards, motion pictures, or telephone directories (other than routine listings).[6]

Consequently, the *content* from social media determines whether a given communication could be deemed an advertisement. For example, static content, such as profile or wall information (in the case of Facebook or LinkedIn), typically remains unchanged and therefore is similar to an advertisement, and should be treated as such. On the other hand, interactive posts, such as chatting, typically are interpreted as analogous to a public appearance, which has different supervisory and maintenance requirements compared to an advertisement. It is therefore imperative to recognize these different formats within social media when developing internal controls, policies and standards for a financial firm.

Next, the firm must become familiar with the platforms of various types of social media. There are professional networking sites, such as LinkedIn, as well as micro-blogging sites, including Facebook, Google+, MySpace and Twitter. There are also discussion forums, personal and professional blogs, customer review websites such as Yelp, and video sites, with YouTube and Flickr amongst the most popular. Users who sign-up to one of these sites will create a profile page that displays their photo and lists their name, biographical information, interests and groups, and may include such information as their educational background and where they are employed. Generally, online profiles are publicly accessible, meaning that anyone can view and read them. One can, however, take steps to make their profile only available to select friends or colleagues that they are directly connected to.

Many sites also allow users to provide additional information, as well as link photos or videos and share comments. For example, LinkedIn is the most popular website used by professionals to network in cyberspace. As a professional networking site, it provides the means to post your resume, send internal messages, join industry-related groups and connect with current and former colleagues, which offers tremendous marketing capabilities.

However, before creating a LinkedIn profile and adding other outside content such as videos, consider the following list of regulatory concerns that are of paramount importance for broker-dealers, investment advisers and funds that use social media:

- Advertising and marketing regulations
- Suitability standards
- Securities offering regulations
- Anti-fraud rules
- Solicitation rules
- Books and records rules
- Privacy regulations
- Fiduciary duties
- Insider trading

There are also additional business risks that firms should consider before embarking on a social media campaign. Not only must the organization weigh the above regulatory considerations, but the firm must also decide how they will address:

- Reputational risks
- Confidentiality concerns
- Employment laws (*e.g.,* anti-harassment or discrimination)
- Defamation
- Intellectual property
- Potential use of social media content in litigation

This article will provide important information relating to regulations governing the use of social media, summarize recent enforcement cases, evaluate various risk management considerations and provide practical tips for firms to consider for evaluating social media usage and designing their social media compliance program.

Regulatory Guidance on the Use of Social Media

Over the past three years, the Financial Regulatory Authority ("FINRA") and the Securities and Exchange Commission ("SEC") have provided much needed guidance on the expectations for social media usage by the financial industry. A summary of the regulatory pronouncements is provided below.

Rules Applicable to Broker-Dealers

In January 2010, FINRA published Regulatory Notice ("RN") 10-06,[7] which provided much-awaited guidance on the application of FINRA rules to blogs and social media websites, with particular focus on suitability, recordkeeping, supervision and content requirements. In August 2011, FINRA RN 11-39[8] was released to address subsequent questions raised by member firms relating to recordkeeping, supervision, links to third-party sites and data feeds. Later that year, FINRA posted to its website a "Guide to the Web for Registered Representatives,"[9] which includes, among other things, links to Regulatory Notices 10-06 and 11-39, FINRA Rules and Interpretive Materials that affect electronic communications (and specifically, Rules 2010, 2130, 2210, 2210(b), 2270, 2310, 2711, 3010 and 3110(a); IM-2210-1, IM-2210-1(6)(c); and RN 07-04, RN 04-18, RN 03-44), and a summary of compliance issues and podcasts to educate member firms about supervisory considerations and assessing social media usage from personal devices.

In the November / December 2011 issue of Practical Compliance & Risk Management for the Securities Industry, Erin E. Reeves authored "Falling in Line Without Falling Behind: Social Media Compliance for Broker- Dealer Firms," which presented both a detailed synopsis of the above-referenced FINRA regulatory considerations, and practical tips on developing policies to assist broker-dealers with their social media compliance efforts. To that end, Ms. Reeves stated, "broker-dealers and investment adviser firms are finding themselves caught in the cross-hairs between the desire to take advantage of social media or other technology and the need to comply with the regulatory mandates put in place by the SEC and FINRA with regard to communications with the public…. With the increasing emphasis on investor protection in recent years, the SEC and FINRA have tightened their grip on the actions of members of the financial industry, and it seems likely that this grip is only going to continue to tighten in the future."[10]

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And tightened it has. Enforcement cases from 2011 through the present have involved various violations of federal securities laws related to the use of social media, including Twitter, LinkedIn and Facebook.

While FINRA's Regulatory Notices provide essential direction and perspective of certain risks associated with social media, the onus is on the member firm to take into consideration the context, facts and circumstances of the social media messaging to determine whether the content and usage are in compliance with FINRA Rules. As the technologies associated with social media continue to change daily, additional guidance is likely needed on an ongoing basis.

Rules Applicable to Investment Advisers

Shortly after FINRA's Regulatory Notices were released, the SEC's Office of Compliance Inspections and Examinations ("OCIE") issued a National Examination Risk Alert in January 2012 (the "SEC Alert").[11] Before this issuance, there was little guidance on compliance and recordkeeping requirements for investment advisers' use of social media, other than FINRA's Regulatory Notices, which do not apply to advisers, absent dual registration.

Generally speaking, social media activities by advisers are governed by the antifraud provisions found in the Investment Advisers Act of 1940, as amended ("Advisers Act"). Specifically, Rule 206 provides, "It shall be unlawful for any investment adviser…to engage in any transaction, practice or course of business which operates as a fraud or deceit upon any client or prospective client."[12] In addition, advertising rules must also be considered. Pursuant to Rule 206(4)-1 of the Advisers Act, investment advisers are *prohibited* from certain activities, including using testimonials,[13] providing past-specific recommendations,[14] and making material misstatements or omissions.

The SEC Alert cautions advisers not only to the need to adopt and review the effectiveness of *specific* social media policies and procedures customized to the firm, but also to clarify which social networking activities are permitted or prohibited by the organization, including the use of social

media by solicitors.[15] The SEC suggested various factors that advisers should consider when developing and evaluating those internal controls surrounding social media use by the firm, its investment adviser representatives and solicitors, which include:

- Usage Guidelines
- Content Standards
- Monitoring and Frequency of Monitoring
- Approval of Content
- Firm Resources
- Criteria for Approving Participation
- Training
- Certification by Employees
- Functionality of Sites
- Personal/Professional Social Media Sites
- Enterprise-Wide Sites
- Information Security[16]

While the SEC Alert did not provide guidance on every feature for every new social media channel, it did provide practical approaches, including a reminder to conform, whenever possible, to those advertising and books and records rules that are already in place.

Guidance Applicable to Investment Companies – IM Guidance Update

In March 2013, the SEC's Division of Investment Management issued IM Guidance Update No. 2013-01[17] to address the application of SEC filing requirements for certain fund-related interactive content – as found in chat rooms and social media such as Facebook and Twitter – and set forth certain subjective criteria which can be used to determine whether communications need to be filed.

For example, there are several types of interactive communications that generally do not have to be filed. This includes *incidental* mention(s) of a specific fund not related to a discussion of the investment merits of the fund, such as "Fund X Family of Funds invites you to their annual benefit for XYZ Charity."[18] It also includes incidental use of the word "performance;" hyperlinks to filed sales material; hyperlinks to broad investment concepts; and responses to an inquiry by a social media user that provides discrete factual information (such as referring the user to the fund's prospectus or filed materials).[19]

On the other hand, other forms of interactive communications do need to be filed with the Commission[20] under the filing requirements of Section 24(b) of the Investment Company Act of 1940 ("1940 Act"), or Rule 497 under the Securities Act of 1933 ("1933 Act") subject to Rule 482. This includes interactive discussions of fund performance that either discuss or promote all or some of the fund's returns. For example, "Our quarter-end returns have exceeded our expectations" would trigger a filing requirement.[21] Communications initiated by the fund that touts the benefits of investing in the fund also must be filed with the Commission.

Use of Social Media by Public Companies

On April 2, 2013, the SEC issued a report of investigation pursuant to Section 21(a) of the Securities Exchange Act of 1934 clarifying that public companies can rely on the application of Regulation Fair Disclosure ("Regulation FD") to use social media to provide corporate disclosures and announcements, so long as investors are alerted ahead of time.[22] The report confirmed that Regulation FD applies to social media, just as it does company websites, and therefore can be used in a similar fashion to disseminate material information so long as investors know where to look for such information. On the other hand, the report of investigation also clarified that using the personal site of a corporate officer to disseminate such information without advance notice to investors would not likely be viewed as an acceptable method of disclosure under the securities laws.[23] This guidance came in response to the SEC's Division of Enforcement conducting an inquiry into Netflix CEO Reed Hastings, who posted on his personal Facebook page material information related to the company – specifically, that Netflix's monthly online viewing had exceeded one billion hours for the first time. Notably, this information was not provided in any other form of a press release, nor on the company's Form 8-K filing, and investors had no advance notice that such information would be provided on Mr. Hasting's personal site.

State Regulatory Considerations

In recent years, states have begun to weigh in on social media practices, and particularly the need to protect the individual rights of the employees. On January 1, 2013, California Assembly Bill No. 1844 ("AB 1844")[24] went into effect, effectively banning California employers from asking job seekers and workers for their usernames and passwords on social networking accounts. The new rule also bans employers from asking personnel and prospective employees

to access their personal social media sites in the presence of the employer; threatening to discharge or discipline an employee who refuses to divulge personal social media; or requesting that any personal social media information whatsoever be divulged, except in the case where it is "reasonably believed to be relevant to an investigation of allegations of employee misconduct or employee violation of applicable laws and regulations, provided that the social media is used solely for purposes of that investigation or a related proceeding."[25] However, these restrictions do not apply to requesting an employee to disclose a username, password or other information used to access employer-issued electronic devices.[26]

California is among six states to pass laws that have made it illegal for companies to request social networking passwords or nonpublic online account information from their employees or job applicants. Illinois, Michigan, Maryland, Delaware and New Jersey also have similar laws. In addition, on January 18, 2012, the Commonwealth of Massachusetts Securities Division ("Division") issued the results from its survey on the "Guidance on the Use of Social Media by Investment Advisers."[27] This study, which was published on July 6, 2011, confirmed that the use of social media by investment advisers was on the rise, with at least 44% of state registered investment advisers using at least one form of social media, and additional advisers representing that they intended to use social media within the next year. Most notably, this study provides important guidance for Massachusetts state registered investment advisers that *differs* from the SEC's National Examination Risk Alert, which was issued just fourteen (14) days prior.

One distinction is the Division's view of "Likes" on an adviser's Facebook page. While the SEC takes the position that a client "Liking" an investment adviser's webpage could be considered a forbidden testimonial,[28] the Division takes the position that a client's "Like" of an adviser's Facebook page, without more, does not constitute a testimonial.[29] On the other hand, the Division considers it a presumption that a client recommendation on an adviser's LinkedIn page is a prohibited testimonial, since it gives the impression that the experience of the client is likely to be achieved by others.[30]

The Commonwealth also provided many examples and practical tips for all advisers to consider. For example, for the "solicited recommendations" function on LinkedIn, Massachusetts cautions that those recommendations that are received are likely entangled with the adviser, and could constitute a testimonial, which is prohibited.

National Labor Relations Board Guidance

The National Labor Relations Board ("NLRB") has provided guidance on what it considers acceptable (and not) in social media policies.[31] When drafting social media policies, the NLRB cautions employers to:

- Not implement policies that prohibit employees from discussing their terms and conditions of employment;
- Not use broad, generic terms such as "inappropriate" or "defamatory" without defining those terms;
- Prohibit specific kinds of disparaging remarks that violate the firm's policies against harassment and discrimination; and
- Prohibit the dissemination of sensitive and confidential company information.

Enforcement Cases – Lessons Learned

Over the past three and a half years, the SEC's Division of Enforcement has brought enforcement cases involving various uses of social media that resulted in violation of securities laws, rules and regulations. Below are some of the most notable cases.

In the Matter of Jenny Quyen Ta, Respondent; FINRA Letter of Acceptance, Waiver and Consent, No. 2010021538701 (Nov. 23, 2010) – Ms. Ta was the former founder of Titan Securities. When she sold her interests in the company in 2006, she continued to serve as a registered principal. In 2009, while at Titan, Ms. Ta maintained a Twitter account with over 1,400 followers, with 372 tweet posts. Thirty-two (32) of these tweets referenced Advanced Micro Devices (NYSE: AMD), which she was extremely optimistic and positive about, predicting an imminent price rise. For example, one tweet stated:

> "It's going 2 b a good Xmas & 2010! Ck out AMD! Like I have said, it should b @ least a $10B co. which should b @ $ 15/shs. HappyTrading!"

Tweets throughout Ms. Ta's account contained projections about future share price increases. Not only did Ms. Ta fail to inform the Titan principal about her Twitter account, but moreover, Ms. Ta failed to disclose that she and her family held over 100,000 shares of AMD. FINRA found the AMD tweets to be unbalanced, lacking adequate disclosure about

conflicts of interest and the "substantial positions" held by Ms. Ta and her family. For this, Ms. Ta was fined $10,000 and received a one-year suspension.

In the Matter of Anthony Fields, CPA d/b/a ANTHONY FIELDS & ASSOCIATES and d/b/a *PLATINUM SECURITIES,* Rel. No. IA-3348 (Jan. 4, 2012) – Mr. Fields was the sole owner of Anthony Fields & Associates, an SEC registered investment adviser, and owner of Platinum Securities Broker, a firm that had applied for membership to FINRA, but withdrew its application in September 2010. Through LinkedIn and other social media, Mr. Fields advertised the availability of several types of prime bank schemes which turned out to be fraudulent. Specifically, he offered to buy and sell fraudulent bank guarantees and medium term notes, which promised significant returns, in exchange for transaction-based compensation. For this, the SEC administrative law judge found that Mr. Fields committed fraud as a result of his LinkedIn posting, barred him from the securities industry, revoked his registration and fined him $150,000.

SEC Report of Investigation of Netflix, Inc. (Apr. 2013) – As previously mentioned, last summer, Netflix CEO Reed Hastings posted information on his personal Facebook, through which he has 200,000 followers. Specifically, on July 3, 2012, Mr. Hastings announced through a Facebook post that "Netflix monthly viewing exceeded 1 billion hours for the first time ever in June [2012]."[32] Within 24 hours of the post, Netflix stock price shot up from $70.45 to $81.72, prompting an SEC investigation.

Mr. Hastings, who has Twitter and LinkedIn accounts,[33] defended his actions, arguing "posting to over 200,000 people is very public" and "the fact of 1 billion hours of viewing in June was not 'material' to investors," and Netflix's stock increases on the day of his post "started well before [the] mid-morning post was out."[34]

No action was taken against either Hastings or Netflix.

Risk Management Considerations – Creating Effective Social Media Protocols

Now that we have reviewed recent regulatory guidelines, explored the latest enforcement cases, and gained a better understanding of why and how social media is used, it is critical to address how financial firms should prepare their employees for implementing sound social media practices. If the organization has social media accounts or would like to permit social media for business purposes, there are many risk management considerations that should be factored as you develop and implement internal controls.

Become Aware of Social Media Functions by Establishing Your Own Account

There are several reasons a firm may wish to establish a social media account. First, by using social media, senior management will gain a better understanding of how the sites function and what capabilities they have. As things evolve and change on these sites, particularly with privacy controls and technology updates, the firm will be better aware of these areas in "real time" and can take actions, as necessary, to evolve supervisory protocols. Secondly, through active involvement in social media site development, senior management will be in a better position to determine what types of sites and content should be allowed and who is most appropriate in the firm to supervise site usage. Once this is determined, supervisory controls may be developed and your social media policy documented.

Evaluate the Costs and Logistics Associated with Social Media

While social media has many benefits, there are associated costs with permitting such practices. When used for a business purpose, social media is a firm communication that is subject to regulatory oversight. Firms are required to maintain required books and records, supervise content and dissemination and consider what technology may be required in order to help fulfill these regulatory obligations.

Consequently, prior to using social media, firms should consider whether such obligations can be fulfilled onsite or whether a third-party service provider will need to be engaged. Social media communications must be archived and made readily accessible to regulators upon request. Many financial firms engage a technology service provider to help develop an infrastructure to collect, archive and provide tools for supervising and reviewing social media communications. Some vendors who provide this type of service include: Arkovi, FaceTime, Global Relay, Smarsh and SocialWare.[35]

Create Your Social Media Policy

Consider Recent Regulatory Guidance

The financial industry received its first regulatory guidance in 2010, when FINRA published Regulatory Notice 10-

06, Guidance on Blogs and Social Networking Sites (Jan. 2010); see also Wolters Kluwer article, "Falling in Line Without Falling Behind: Social Media Compliance for Broker-Dealer Firms," (Nov/Dec 2011). Since that time, the use of social media has proliferated, additional regulatory guidance has been provided, and firms have further increased their use of social media to communicate with clients and shareholders.

The content from social media determines whether a given communication could be deemed an advertisement.

When drafting a social media policy, begin with the basics by considering what is social media in broad terms, and how is it being used by the firm. In 2010, FINRA reminded us that social media is a form of electronic communications, which, if used for a business purpose, likely meets the definition of an electronic business communication, thereby requiring preservation by electronic means.[36] Importantly, the deciding factor in whether a communication must be retained is its content and use.[37] Therefore, the first step in creating your policy is to determine whether the firm will permit social media to be used for a business purpose.

Regardless of whether the firm wishes to permit social media for a business purpose, a supervisory system must be established to ensure that associated persons comply with the firm's policy. Should the firm elect to permit social media usage for a business purpose, additional controls and safeguards must be created, such as preservation of social media sites, including the static and interactive communications that are conveyed on such sites.

Establish Controls for Reviewing and Supervising Communications

In order to streamline and manage social media use, many firms are electing to limit those within the organization who may be permitted access to the firm's social media sites. Theoretically, by limiting access to and/or prohibiting certain types of communications related to the company to only those persons who have received training and guidance on social media use, fewer supervisory issues may arise, and risks of potential abuses are mitigated. For those firms utilizing blocking functions, FINRA recommends periodic testing to ensure the programs are working as intended. For those organizations that choose this course, written policies should clearly indicate that social media use is restricted to certain individuals, specifying the social media sites that are permitted and used by the firm, and providing training on what types of communications are and are not prohibited on such sites.

One of the fundamental considerations for any social media supervisory control system is having the ability to capture and review social media communications in a timely fashion. As previously mentioned, the majority of financial firms engage a third-party service provider to capture, retain and provide the necessary tools for surveying social media communications. When selecting a vendor, consider the functionality of their system and whether the system has the ability to:

- Utilize a lexicon of words to identify key words or phrases, such as "guarantee," "promise" or other sensitive terms that serve as "red flags" for potentially misleading statements;
- "Flag" customer complaints, problems / action items that require immediate attention and escalation; and
- Capture and document the supervisor's review of the social media communication.

Memorialize Protocols and Provide Examples of Acceptable Social Media Practices

In developing effective policies for social media usage, there are certain basic fundamentals that should be addressed.

Define Required, Permissible and Prohibited Content

For those organizations that elect not to use social media for business purposes, it is important nevertheless to ensure associated persons know what is permissible when it comes to their own personal social media sites. Many firms typically will permit associated persons to post biographical information, such as the firm's name and the individual's title, on their personal social media sites, while strictly forbidding any other reference to the organization (*i.e.,* mention of the firm's products, services and investments are prohibited). Any social media site that references the firm's name should, however, be approved and maintained by the firm's compliance officer, who should approve any subsequent changes prior to posting.

Just as important is defining prohibited conduct. Any biographical postings that contain accolades or testimonials, including recommendations or referrals or commentary that alludes to the associated person's services or specialization, should be scrutinized, with guidance provided on what is and is not an acceptable posting.

Also, dependent upon the content, consider whether social media sites should contain disclosures. Example: "The information contained on this site is for informational purposes only and should not be considered as investment advice or as a recommendation of any particular strategy or investment product. This profile should not be considered as a solicitation for services."

If using a data feed, other controls should be considered. A data feed is commonly used to upload information from the web, such as news, real-time stock quotes, investment information or blogs. Since data feeds are fed from third party sources, the investment firm carries the responsibility of having a reasonable belief that the information being continually provided is complete and accurate.

In RN 11-06, FINRA provides guidance on the types of controls that financial institutions can implement for data feeds. First, become familiar with the source vendor's proficiencies and abilities to provide accurate data at the time it is presented on the financial institution's website. To that end, firms should make due inquiry to understand the criteria used by vendors for gathering or calculating the types of data presented so that the financial institution can determine whether such criteria is "reasonable." Such reviews should be conducted on a periodic basis and, if necessary, prompt action should be taken to correct any inaccuracies detected.

Next, consider whether a third-party link may subject the firm to "adoption" or entanglement," which carry with them potential liabilities for the content. "Adoption" typically occurs when a firm endorses a third-party's statements, which could include paying for the third-party link. "Entanglement" generally occurs when a firm participates in the development of the linked information. Based on regulatory guidance provided to the financial industry by way of Notices to Members, Regulatory Notices[38] and Interpretive Releases, investment firms have been put on notice that they indeed can be held liable for the content of a third-party linked site if the firm knows or should have known that the linked information is false or misleading. Therefore, it is imperative to take reasonable steps to help ensure that any third-party site links are from reputable sources deemed to be reliable. Moreover, to avoid potential adoption and entanglement issues, consider adding disclosures, such as: "*You are about to leave XYZ firm's website. We are not responsible for the content of this third-party site*."

Identify Qualified Supervisors

It is essential to identify persons who are knowledgeable about social media and can serve in a supervisory capacity for reviewing and approving social media communications. The designated supervisors should be able to demonstrate that they are familiar with regulatory requirements and have sufficient knowledge, experience and training to perform the reviews. This experience may include:[39]

- Prior advertising communications supervisory experience;
- Professional licenses or designations;
- Completion of regulatory training courses;
- Familiarity with the firm's services and products; and
- Length of service with the firm.[40]

The reviewer must have the ability to identify risks, adequately document issues presented, and effectively oversee the firm's social media policy to ensure it is not inadvertently being circumvented by associated persons.

Determine Frequency of Review

Generally, the frequency of reviewing social media sites varies depending upon the firm's business model.[41] Factors to consider when determining the frequency of review include:

- The market sensitivity to the activity;
- The scope of the activities; and
- The volume of correspondence subject to review.[42]

Firms should provide guidance on reviewing correspondence, and designate reasonable timeframes within which supervisors are required to complete the reviews.[43] Consideration should be given to the type of business being conducted and the degree of risk which may accumulate with the passage of time. For example, since social media sites are open to a retail customer base (compared to institutional clientele), it is likely that the organization will need to increase its frequency of review, since such communications are widely transmitted to a less sophisticated audience.

Due to the volume of electronic communications received, many firms conduct random reviews based on a certain percentage of communications generated. Others do "spot-checks" based on the firm's business model and associated risks. Regardless of the method used, firms should seek to establish an effective system for identifying issues and inadvertent misrepresentations that can be quickly addressed and corrected.

Establish Supervisory Controls and Safeguards

As we move into a rapidly evolving electronic age of communications, firms should ensure that their safeguards and protocols are dynamic and constantly evolving. To accomplish this, consider implementing the following procedures:

- Conduct surveys on how employees use social media and restructure controls accordingly
- Limit the number of authorized users to the firm's social media site
- Monitor social media activities for exaggerated or unwarranted claims and add appropriate disclosures as necessary to relay material information to recipients
- Train employees to understand the distinctions between a business communication versus a personal communication
- Develop a solid supervisory system and consistently conduct reviews – MONITOR, MONITOR, MONITOR!

Train Employees and Communicate the Firm's Expectations on Social Media Usage

Once the social media policy is established, conduct training with all employees and new hires. Provide various scenarios on acceptable profiles, content and site usage, paying particular attention to recordkeeping practices and advertising/correspondence regulatory communications. Role playing often serves as an effective mode of training in these instances. Repeat as needed and be sure to maintain records of the training materials and participants, which may be requested during a regulatory examination.[44]

Conclusion

Social media is here to stay. While once dreaded by compliance professionals, technology advancements in the form of recordkeeping and maintenance and regulatory guidance have allowed financial institutions to formulate solid internal controls to allow for social media usage. When customizing your social media compliance program, consider the following risk management tips:

1. Define what content constitutes a "business communication" for purposes of social media and determine if your firm will permit the use of social media for such business communications. For example, many firms may permit employees to have a LinkedIn page and list the financial institution's name, which would not necessarily be deemed a business communication, since such posting is similar to a resume and would not be deemed an advertisement. Other firms have taken the position that if you list your job responsibilities or what services the financial institution provides, such communications could be deemed "business communications" and subject to either pre-approval by compliance or prohibition of posting, dependent upon whether the firm allows the use of social media for business communications.
2. Implement detailed written policies and procedures that outline the acceptable use of social media for business purposes, including what systems (*i.e.,* company issued versus personal electronic devices) are acceptable for use when posting, being sure to provide clear guidance on supervisory responsibilities.
3. Provide extensive training and education to employees on your firm's policies for using social media for business communications, including examples of what they can and cannot do.
4. Perform and document initial and periodic detailed due diligence on the third-party vendors who provide data feeds to the firm's social media sites.
5. Develop protocols to check that information posted to social media sites is correct, timely and accurate and consider adding disclosures when clicking on links to third-party sites.
6. Use technology solutions to capture all required books and records for social media sites.
7. Develop forensics for testing the effectiveness of your compliance controls for social media usage and refine as necessary.

ENDNOTES

1 Source: Merriam-Webster Dictionary, *available at* http://www.merriam-webster.com/dictionary/social%20media.

2 Source: Pew Research Center's Internet & American Life Project Post-Election Survey (Nov. 14 – Dec. 9, 2012).

3 *Id.*; data provided as of August 2012.

4 Source: Reuters, Advisers Benefit from "Listening" on Social Media (Mar. 1, 2013) *available at* http://www.reuters.com/article/2013/03/01/us-yourpractice-socialmedia-idUSBRE9200WL20130301.

5 Rule 206(4)-1 of the Investment Advisers Act of 1940, as amended, at http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr;rgn=div5;view=text;node=17%3A3.0.1.1.23;idno=17;cc=ecfr#17:3.0.1.1.23.0.159.33 .

6 FINRA Rule 2210 at http://finra.complinet.com/en/display/display.html?rbid=2403&record_id=10467&element_id=3617&highlight=2210#r10467.

7 For additional information, *see* FINRA Regulatory Notice 10-06, *available at* http://www.finra.org/Industry/Regulation/Notices/2010/P120760.

8 For additional information, *see* FINRA Regulatory Notice 11-39, *available at* http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p124186.pdf.

9 For more information, *see* Guide to the Web for Registered Representatives, *available at* http://www.finra.org/Industry/issues/Advertising/p006118.

10 Practical Compliance & Risk Management for the Securities Industry, "Falling in Line Without Falling Behind: Social Media Compliance for Broker-Dealer Firms," (Nov. / Dec. 2011) at p. 55 and 58.

11 *See* "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.

12 15 U.S.C. §80b-6.

13 Exceptions exist for third party reports, partial client lists and ratings.

14 Past specific recommendations may be provided so long as the adviser complies with certain requirements found in SEC No-Action Letters, e.g., *see* Franklin Management, Inc., SEC No-Action Letter (Dec. 10, 1998) and The TCW Group, Inc., SEC No-Action Letter (Nov. 7, 2008).

15 *See* "National Examination Risk Alert: Investment Adviser Use of Social Media" (Jan. 4, 2012) at p. 2.

16 *Id.* at p. 3-5.

17 IM Guidance Update, No. 2013-01 (Mar. 2013) *available at* http://www.sec.gov/divisions/investment/guidance/im-guidance-update-filing-requirements-for-certain-electronic-communications.pdf.

18 *Id.* at p. 1.

19 *Id.* at p. 1-2.

20 Investment company advertisements subject to Section 24(b) of the 1940 Act and Rule 482 of the 1933 Act are considered filed with the Commission if filed with FINRA.

21 IM Guidance Update, No. 2013-01 (Mar. 2013) at p 4.

22 Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: Netflix, Inc., and Reed Hastings, Release No. 69279 (Apr. 2, 2013), *available at* http://www.sec.gov/litigation/investreport/34-69279.pdf.

23 SEC Press Release, "SEC Says Social Media OK for Company Announcements if Investors Are Alerted" (Apr. 2, 2013), available at http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171513574.

24 Employer Use of Social Media, Part 3 of Division 2 of the State of California Labor Code at Chapter 2.5, Section 980, available at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120AB1844.

25 *Id.*

26 *Id.*

27 Guidance on the Use of Social Media by Investment Advisers, The Commonwealth of Massachusetts Securities Division (Jan. 18, 2012), *available at* http://www.sec.state.ma.us/sct/sctpdf/The-Use-of-Social-Media-by-Investment-Advisers.pdf.

28 *See* "National Examination Risk Alert: Investment Adviser Use of Social Media" (Jan. 4, 2012).

29 *See* Guidance on the Use of Social Media by Investment Advisers, The Commonwealth of Massachusetts Securities Division (Jan. 18, 2012) at p. 4.

30 For additional information and examples, *see Id.* at p. 4-5.

31 For additional information, *see* The NLRB and Social Media available at http://www.nlrb.gov/node/5078.

32 Eric Savitz, Netflix Tops 1B Streaming Hours In June; Citi Stays Bullish, Forbes, July 3, 2012, *available at* http://www.forbes.com/sites/ ericsavitz/2012/07/03/netflix-tops- 1b-streaming-hours-in-june-citi-stays-bullish/; see also http://www.facebook. com/reed1960.

33 https://twitter.com/reedhastings; http://www.linkedin.com/in/ reedhastings.

34 Ex. 99.1 to Netflix Current Report on Form 8-K, filed Dec. 5, 2012.

35 The aforementioned vendors are provided for informational purposes only and are not intended as an endorsement of any service provider. Firms are strongly encouraged to conduct thorough due diligence prior to engaging any third-party vendor.

36 *See* FINRA Regulatory Notice 10-06, *available at* http://www.finra.org/Industry/Regulation/Notices/2010/P120760.

37 FINRA, Guide to the Internet for Registered Representatives, *available at* http://www.finra.org/Industry/Issues/Advertising/p006118 (last visited June 29, 2010).

38 *See generally* "Ask the Analyst – Electronic Communications," NASD Regulation, Regulatory & Compliance Alert (Mar. 1999); FINRA: Guide to the Internet for Registered Representatives, *available at* www.finra.org/Industry/Issues/Advertising/p006118; "Electronic Communications: Social Networking Web Sites" (Mar. 10, 2009) available at www.finra.org/podcasts; SEC Guidance on the Use of Company Web Sites, SEC Rel. No. 34-58288 (Aug. 1, 2008); Use of Electronic Media, SEC Rel. No. 33-7856 (Apr. 28, 2000); FINRA Notice to Members 05-48 (Jul. 2005); FINRA Regulatory Notices 10-06 and 11-39 (Aug. 2011); and "National Examination Risk Alert: Investment Adviser Use of Social Media" (Jan. 4, 2012).

39 *Social Media Web Sites,* FINRA Regulatory Notice 10-06, January 2010, at 7.

40 *Supervision of Electronic Communications*, FINRA Regulatory Notice 07-59, December 2007, at 11

41 *See Supervision of Electronic Communications*, FINRA Regulatory Notice 07-59, December 2007, at 5.

42 *Id.* at 5.

43 *Id.*

44 FINRA, Guide to the Internet for Registered Representatives, *available at* http://www.finra.org/Industry/Issues/Advertising/p006118 (last visited June 29, 2010).