
# Social Media in 2021 – Are Advisers Subject to the Old Rules or New Rules? And What Then?

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How investment advisers use social media for marketing advisory services has rapidly evolved over the last 25 years. What used to be heavily debated – to use social media or not – is now commonplace. For some, social networking and microblogging on sites such as LinkedIn, Facebook and Twitter occur daily.

As a result of COVID-19, the use of social media is at an all-time high due in part to advisers' inability to host or attend in-person meetings and large-scale conferences. Organic marketing in the form of blog posts, case studies, videos, tweets and social interaction posts dramatically increased as advisers attempt to drive potential customers to their website to learn more about the adviser's services and offerings, with the hope of converting qualified leads to advisory clients. Leveraging social media allows advisers the ability to deepen their relationship with existing clients, acquire new clients and gain referrals. Social media also is geared for a larger marketplace, and for potential investors it offers a forum through which to vet possible money managers.

In 2005, just five percent of Americans used social media. Today, more than 72 percent of the public uses some type of social media, according to the Pew Research Center. We have seen social media evolve from a simple platform that attracts clients, to one that encourages reviews and feedback of consumer experiences and engages users to constantly contribute to online conversations. As the use of social media has transformed, so too has the SEC's guidance in this particular area.

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As the use of social media increased, from 2011 and 2012, the financial industry saw a rise in enforcement cases involving fraudulent activities occurring on social media outlets. In response, on January 4, 2012, the SEC's Examinations Division (formerly known as the Office of Compliance Inspections and Examinations or "OCIE") issued a National Examination Risk Alert. Among other things, the 2012 Risk Alert put investment advisers on notice and cautioned "investment advisers that use or permit the use of social media by their representatives, solicitors and/or third parties should consider periodically evaluating the effectiveness of their compliance program as it relates to…usage guidelines, content standards, sufficient monitoring, approval of content, training…and use of third party content."

Over time, social media practices became more widely used by investment advisers. In 2014, the SEC Division of Investment Management issued a Guidance Update on the Testimonial Rule and Social Media in 2014 (2014 Guidance Update), and later in 2017, published a Risk Alert, "The Most Frequent Advertising Rule Compliance Issues Identified in OCIE Examinations of Investment Advisers," highlighting the prohibited use of testimonials in the form of client endorsements on firm websites, social media pages and pitch books.

In 2020, social media use exploded by investment advisers, as did the compliance program guidance provided by the Staff. As referenced further below, in 2020, the SEC issued three Risk Alerts which, among other things, focused on social media and social media content, alerting firms to review practices and address:

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- Communications or transactions occurring outside of the firms' systems due to personnel working from remote locations and using personal devices (COVID-19 Risk Alert);
- Advertising (including social media) materials prepared by supervised persons located in branch offices that were deficient due to material omissions and unsupported claims (Multi-Branch Risk Alert);
- Implementation of compliance procedures regarding advertising and review of advertising materials (Compliance Programs Risk Alert); and
- Oversight of solicitation arrangements, performance advertising use and prevention of the use of misleading marketing presentations, including on websites (Compliance Programs Risk Alert).

In this article, we will review the evolving SEC guidance as it relates to social media. Throughout, we will highlight social media guidance provided in the SEC's new Investment Adviser Marketing Rule (the "**New Marketing Rule**") adopted in December 2020, including how the permitted use of testimonials will impact current social media practices. Finally, we will discuss compliance program considerations and best practices for investment advisers to implement when using social media.

**Important note:** *Although this article discusses how the New Marketing Rule may affect advisers' social media use, its* ***focus is on what advisers should be doing now*** *since the New Marketing Rule will not go live for* ***at least 20 months from now****. The new rule is not yet in effect and will have a long transition period before compliance will be required.*

## I. How the New Marketing Rule May Impact Investment Advisers' Social Media Practices

Once the New Marketing Rule goes into effect and compliance is required, it will, for the first time, permit investment advisers the ability to include client testimonials, including reviews and referrals, within electronic media outlets. While the new rule is not yet in effect, many marketing departments are already considering how this may impact their current advertising practices.

For social media, the use of testimonials could significantly affect where advertising dollars are spent by the adviser. Today, many consumers turn to Yelp, Amazon reviews, and Consumer Reports prior to engaging a service or purchasing a product. Now, investment advisers will be able to do the same and let consumers know how they fare in comparison to their competitors.

In doing so, the adviser must consider the new guidance provided by the Commission when using testimonials. The New Marketing Rule defines a testimonial as "any statement by a current client or private fund investor about their experience with the investment adviser or its supervised persons." The definition of endorsement includes "any statement by a person other than a current client or private fund investor that indicates approval, support, or recommendation of the investment adviser or its supervised persons or describes that person's experience with the investment adviser or its supervised persons." This could, for example, include a blogger's website review of an adviser's advisory services. An endorsement also extends to opinions about the adviser's expertise and capabilities as well as to its supervised persons (*e.g.*, about a professional's trustworthiness). If a testimonial or endorsement is provided, the adviser must disclose if the testimonial was made by a client or private fund investor and whether the person providing it was or is being compensated. Forms of compensation to consider include: fees based on a percentage of assets under management, flat fees, retainers,

The new definition of "advertisement" in the first prong of the definition is any direct or indirect communication an investment adviser makes to more than one person, or to one or more persons if the communication includes hypothetical performance information, that offers the investment adviser's investment advisory services with regard to securities to prospective clients or investors in a private fund advised by the investment adviser or offers new investment advisory services with regard to securities to current clients or investors in a private fund advised by the investment adviser. Excluded from this definition are:

- Extemporaneous, live, oral communications (regardless of whether they are broadcasted);
- Information in a statutory or regulatory notice, filing or other required communication; and
- Communications that include hypothetical performance that is provided in response to an unsolicited client or investor request or to a private fund investor in a one-on-one communication.

The second prong of the definition of "advertisement" includes any "endorsement" or "testimonial" for which the adviser provides compensation, directly or indirectly. Certain communications that are endorsements or testimonials are excluded from certain conditions.

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hourly fees, reduced advisory fees, fee waivers as well as cash and non-cash rewards (including referral fees, prizes and gifts and entertainment). To the extent that compensation is provided, any material terms related to the compensation should be disclosed in addition to any conflicts.

The New Marketing Rule provides a long-awaited and much-needed modernization of an antiquated rule that dates back to 1961 when fax machines, email, and online media didn't yet exist. The new rule is meant to provide consolidated and clear guidance, support the change to a principles-based regulation, and lead toward a fair and balanced approach to adviser advertising, including social media. The new rule modifies the definition of "advertisement" to be more evergreen in light of ever-changing technology and notably, the definition does not apply to communications directed to only one person (except for hypothetical performance presented in a one-on-one communication, under certain circumstances).

Notably, the New Marketing Rule does not require compliance preapproval for live broadcasts on radio, television, or social media. It also gives advisers the latitude to assign advertising approval responsibility to any qualified employee with the stipulations that the reviewer be knowledgeable about the new rule's requirements and that the employee who creates the advertisement should not be the same person who approves it.

The New Marketing Rule also provides guidance and addresses other areas impacting an adviser's social media compliance controls and policies, including:

- Use of hyperlinks to third-party content (including adoption and entanglement considerations);
- How third-party posts of public commentary to the adviser's electronic media could make content attributable to the adviser (thus triggering further evaluation if the social media is an "indirect" advertisement, requiring additional disclosures);
- Considerations for supervising associated persons' social media accounts for marketing the adviser's advisory services (with a focus on supervisory efforts and training);
- How to avoid misleading implications or inferences when presenting and using client testimonials (such as by clearly labeling the testimonial as being a paid testimonial or endorsement and the relationship of the person making the testimonial or endorsement, including any conflicts);
- Considerations for the use of hyperlinking to disclosures on electronic media platforms (and when it would or would not be permitted); and
- Guidance on how to tailor an adviser's compliance program to prevent violations of the Investment Advisers Act of 1940, as amended ("**Advisers Act**").

> Once the New Marketing Rule becomes effective, an investment adviser may comply with the Rule before the compliance date — but if it does, the advisory firm must comply with all requirements under the Rule. For example, an adviser may not simply elect to comply with the testimonials and endorsements provisions of the new rule without also complying with the new performance advertising, recordkeeping, disclosure, and solicitor standards.

Importantly, the compliance date for the New Marketing Rule is 18 months after the effective date (which is 60 days after publication in the *Federal Register*, which, as of the date of this authorship, has not yet occurred). Once the new rule is effective (60 days after publication), an adviser may elect to comply sooner than 18 months. However, if it does so, the adviser will have to comply with all requirements of the Rule (which are many) and not just some (such as the requirements for testimonials and endorsements). Thus, it is prudent to consult with your outside counsel prior to making the decision to comply early.

*Unless specific SEC guidance is provided during the interim to the effective date of the New Marketing Rule (or the advisory firm voluntarily adopts the New Marketing Rule standards in their entirety before the compliance date), the current prohibitions of Rule 206(4)-1 apply, and therefore, client testimonials are still prohibited.*

## II. In the Meantime . . . Historical SEC Guidance and Best Practices Provided on Social Media Still Apply

While the New Marketing Rule will impact advisers' use of social media, much of the historic guidance provided by the Commission Staff previously remains applicable and should be considered as advisers continue to modify and enhance policies and procedures related to social media use by the advisory firm and its supervised personnel.

Advisers' social media activities are governed by the antifraud provisions found in the Advisers Act. Section 206 of the Advisers Act provides, "[i]t 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." Before the SEC issued the 2014 Guidance Update, there was limited direction 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.

The 2012 Risk Alert alerted invest-

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ment advisers on the integral value of adopting and reviewing whether social media policies and procedures were effective and specific to the firm and its practices (such as detailing which social networking activities are permitted or prohibited by the organization and its solicitors). 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

**This guidance still applies today**. Practically speaking, as advisers continue to use social media, they must:

- Adopt policies and procedures customized to the firm's social media usage;
- Review third-party content for integration and entanglement considerations and weigh, based on facts and circumstances, if disclosures or other actions need to be taken;
- Focus on supervisory techniques to monitor compliance with the firm's social media policies; and
- Maintain required books and records relating to social media.

These financial industry best practices were reiterated by the 2014 Guidance Update. The SEC stressed the need to look at social media practices on a facts and circumstances basis and provided that, "any arrangement whereby the investment adviser or investment adviser representative ('IAR') compensated the independent social media site, including with advertising or other revenue, in order to publish or suppress the publication of anything less than the totality of the public commentary submitted could render any use by the IAR or investment adviser on its social media site violative of the prohibition on testimonials." Thus, compliance programs must take due care to understand the nature of the relationship between the investment adviser and the social media site. This analysis should include review of any compensation arrangement and the adviser's ability to suppress information. Once known, compliance policies, training and guidance on do's and don'ts can be developed and communicated to advisory personnel to help prevent violations of the Advisers Act. By way of example, based on a firm's social media practices, some advisers have adopted specific policies for monitoring and hiding endorsements on LinkedIn.

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**Fast-forward to 2020**, in response to COVID-19, the Staff cautioned advisers to take steps to evaluate how their businesses have changed – operationally, technologically and commercially. In particular, the SEC asked advisers to review their policies and procedures and enhance compliance monitoring. Once again, the SEC cautioned that they had concerns with deficiencies they found related to advertising, both generally (due to supervisory deficiencies) and remotely (by branch offices). The SEC suggested in the Multi-Branch Risk Alert that compliance programs take into consideration:

- Whether presentations are omitting material disclosures;
- Whether materials include superlatives or unsupported claims;
- Whether the credentials or experience of supervised persons are falsely stated; and
- Whether third-party rankings omitted material facts related to these accolades.

In the Compliance Programs Risk Alert, the SEC's Examinations Division also shared weaknesses they witnessed regarding how policies and procedures were tailored as the policies and procedures related to:

- Overseeing solicitor arrangements;
- Preventing misleading marketing information, including websites; and
- Overseeing the use and accuracy of performance advertising.

Nearly all of these areas can be addressed by employing internal controls

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that were set forth in the 2014 Guidance Update. Namely, compliance programs should establish content standards, frequently monitor materials and set forth training for the firm and its supervised persons to help reiterate compliance standards and practices.

## III. Practical Tips for Advancing Your Social Media Compliance Program

As discussed above, the social media environment and the regulations that govern electronic media are continuing to evolve. Below are steps firms can take now to help advance their social media compliance program. These practical steps will be equally applicable once the New Marketing Rule goes into effect.

1. 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.

2. 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 (such as posting articles on LinkedIn).

3. Perform and document initial and periodic detailed due diligence on the third-party vendors that provide data feeds to the firm's social media sites.

4. 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.

5. Use technology solutions to capture all required books and records for social media sites.

6. Develop forensics for testing the effectiveness of your compliance controls for social media usage and refine as necessary.

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