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Legal Risk Management Tip
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Social Media in 2021 – Are Advisers Subject to the Old Rules or New Rules, and What Then? (Part 2)

In last month's article, we highlighted the highly anticipated New Marketing Rule and the implications and impacts it may have on the financial industry as it relates to social media usage. Among other things, the permitted use of testimonials will forever change the way investment advisers advertise by allowing consumers to share their experience with a particular adviser. Moreover, the "new" definition of advertising provides for principles-based regulation in a broad context, to be applied to our ever-changing electronic media and mobile communications environment. Now published in the Federal Register, the New Marketing Rule goes into effect on May 4, 2021, with a compliance date of November 4, 2022.

But between now and then, what should advisers do?

This month's Legal Risk Management Tip will focus on addressing this question. As historic SEC guidance continues to apply until an advisory firm complies with the New Marketing Rule or November 4, 2022 (whichever is sooner) it is critically important to evaluate how the firm is complying with the old standards and consider how the firm will comply with the new standards once they do go into effect. Throughout, we will provide tips and suggestions on how can enhance and advance your social media program in 2021 and in the future.

Currently, 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 investment 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.

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 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.

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 (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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