

## Social Media – Compliance Risk Management Considerations

By Tina Mitchell

New technologies and social media outlets are everywhere you turn. A report issued in November 2014 by the U.S. Department of Commerce Economics and Statistics Administration (US Census Bureau)<sup>1</sup> outlined that:

“In 2013, 83.8 percent of U.S. households reported computer ownership, with 78.5 percent of all households having a desktop or laptop computer, and 63.6 percent having a handheld computer.”

In the financial industry, more and more investment advisory and broker-dealer firms are utilizing technology, including the use of social media for business advertising and client communications. This is being employed in a number of ways, including through use of:

- Websites for business promotion;
- Blogs, microblogs, and bulletin boards for distribution of experiences, ideas and observations;
- Networking sites to connect and exchange ideas with other professionals in the industry;
- Client portals to provide clients with access to account information and documents; and
- Video and presentation posting sites for providing financial advice and investment educational information

In this article, we discuss the ongoing regulatory concerns of the Securities and Exchange Commission (“SEC”) and the Financial Industry Regulatory Authority (“FINRA”) regarding the industry’s use of social media, and provide practical risk management tips for investment advisers and broker-dealers

<sup>1</sup> U.S. Computer and Internet Access in the United States: 2013, American Community Survey Reports (November 2014) at <http://www.census.gov/content/dam/Census/library/publications/2014/acs/acs-28.pdf>.

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to help ensure proper oversight and controls pertaining to the applicable risks in this area.

### Regulatory Considerations

FINRA and the SEC have issued numerous risk alerts to registered firms and provided guidance to investors pertaining to the use of social media in the financial industry. Their continued concerns surround not only the potential for financial firms to harm investors through this venue, but also the potential of a firm’s lack of adherence to applicable regulations, particularly in the areas of marketing and advertising, solicitation activities, safeguarding non-public information, books and records retention, anti-money laundering, custody and cybersecurity.

Below is a timeline of some of the more notable steps taken by the SEC and FINRA in the last five years via alerts, disciplinary cases and written bulletins that publicize regulatory issues and concerns surrounding social media.

### SEC Actions

*January 2012* – Division of Enforcement issued a cease and desist order against a registered investment adviser who they alleged had violated a number of federal securities laws by, among other things, making multiple fraudulent offers of fictitious securities through various forms of social media and disseminating materially false and misleading information via firm websites.<sup>2</sup>

Simultaneous to the issuance of the press release regarding that case, the SEC Office of Compliance Inspections and Examinations (“OCIE”) issued a National Exam Risk Alert to investment advisers providing guidance on their use of social media,<sup>3</sup> and the SEC Office of Investor Education and Advocacy (“OIEA”) published an Investor Alert and Investor Bulletin to assist investors in avoiding investment fraud on the internet.<sup>4</sup>

<sup>2</sup> In the matter of Anthony Fields, CPA d/b/a/ Anthony Fields & Associates and d/b/a Platinum Securities Brokers (IA Release No. 3348, Jan. 4, 2012).

<sup>3</sup> National Exam Risk Alert (Jan. 4, 2012) at <http://www.sec.gov/about/offices/ocie/riskalert-socialmedia.pdf>.

<sup>4</sup> SEC Investor Alert – Social Media and Investing – Avoiding Fraud (Jan. 4, 2012) at <http://www.sec.gov/investor/alerts/socialmediaandfraud.pdf>. See also SEC Investor Bulletin – Social Media and Investing – Understanding Your Accounts (Jan. 4, 2012) at <http://www.sec.gov/investor/alerts/socialmediaandinvesting.pdf>.

May 2012 – OIEA published an Investor Bulletin to help senior investors who use the internet on avoiding investment fraud.<sup>5</sup>

March 2013 - Division of Investment Management issued written guidance to registered investment companies on their obligation for filing certain interactive data.<sup>6</sup>

March 2014 – Division of Investment Management issued written guidance to investment advisory firms on the testimonial rule and use of social media.<sup>7</sup>

July 2014 – OIEA issued an Investor Alert on stock rumors communicated through social media.<sup>8</sup>

November 2014 - OEIA updated and reissued its 2012 Investor Alert on avoiding investment fraud.<sup>9</sup> **FINRA Actions**

January 2010 – FINRA issued written guidance on a firm's use of blogs and social media websites.<sup>10</sup>

July 2010 – FINRA issued an alert to investors on social media-linked Ponzi schemes in regards to high-yield investment programs.<sup>11</sup>

February 2011 - FINRA listed electronic communications and social media use as issues of heightened regulatory importance in its annual exam priorities letter.<sup>12</sup>

January 2012 - FINRA again listed electronic communications and social media use as issues of heightened regulatory importance in its annual exam priorities letter.<sup>13</sup>

June 2013 - FINRA performed a sweep exam on broker-dealer social media communications,<sup>14</sup> which included, but was not limited to a review of a firm's top 20 producers based on commissions who used social media for communicating with

investors, and the firm's current written supervisory procedures covering social media communications.

5 SEC Investor Bulletin – Social Media and Investing – Tips for Seniors (May 1, 2012) at <http://investor.gov/news-alerts/investor-bulletins/social-media-investing-tips-seniors>.

6 SEC Division of Investment Management IM Guidance Update #2013-01 (Mar. 2013) found at <http://www.sec.gov/divisions/investment/guidance/im-guidance-update-filing-requirements-for-certain-electronic-communications.pdf>.

7 SEC Division of Investment Management IM Guidance Update #2014-04 (Mar. 2014) found at <http://www.sec.gov/investment/im-guidance-2014-04.pdf>.

8 SEC Investor Alert – Social Media and Investing – Stock Rumors (Jul. 25, 2014) at [http://www.sec.gov/oiea/investor-alerts-bulletins/ia\\_rumors.html](http://www.sec.gov/oiea/investor-alerts-bulletins/ia_rumors.html).

9 SEC Updated Investor Alert – Social Media and Investing – Avoiding Fraud (Nov. 12, 2014) at [http://www.sec.gov/oiea/investor-alerts-bulletins/ia\\_socialmediafraud.html](http://www.sec.gov/oiea/investor-alerts-bulletins/ia_socialmediafraud.html).

10 FINRA Regulatory Notice 10-06 – Social Media Websites (Jan. 2010) at <http://www.finra.org/sites/default/files/NoticeDocument/p120779.pdf>.

11 FINRA Investor Alert – HYIPS Hazardous to Your Portfolio (Jul. 15, 2010) at <http://www.finra.org/investors/alerts/hyips%E2%80%94high-yield-investment-programs-are-hazardous-your-investment-portfolio>.

12 FINRA Annual Regulatory and Examination Priorities Letter (Feb. 8, 2011) at <http://www.finra.org/sites/default/files/Industry/p122863.pdf>.

13 FINRA Annual Regulatory and Examination Priorities Letter (Jan. 31, 2012) at <http://www.finra.org/sites/default/files/Industry/p125492.pdf>.

14 FINRA Targeted Exam Letter (Jun. 2013) at <http://www.finra.org/industry/spot-check-social-media-communications>.

April 2015 - FINRA issued a disciplinary action and fine against a research analyst who failed to disclose his ownership of securities he was discussing via social media.<sup>15</sup>

Also available on FINRA's website at [www.finra.org](http://www.finra.org) are a number of electronic courses (E-Learning) and pod casts, which cover social media.

### Risk Management Controls

The risks surrounding the use of social media by financial firms can vary considerably and are dependent on, among other things, the type and extent of a firm's social media use. Investment advisers and broker-dealers using social media should have risk management controls that are customized and equivalent to their usage, and constructed to prevent investor harm. That being said, there are important core protocols that apply to all firms using social media. These include:

- Having written policies and procedures covering social media use, including compliance with applicable state and federal regulations;
- Performing annual risk assessments on the firm's social media activities;
- Requiring pre-approval for employees setting up business social media sites;
- Reviewing and monitoring firm and employee social media postings and updates;
- Implementing a due diligence process covering third party providers;
- Developing controls for retention of all required records pertaining to social media use;
- Ensuring privacy safeguards are in place;
- Implementing appropriate disclosures, as needed; and
- Training employees on firm policies and regulatory requirements.

### Conclusion

There are new social mediums being created continuously and user participation is on the rise. Many social media sites are either free to use or very economical, so it is likely financial firms will continue to rely on, and even expand their use of such sites to promote their business and communicate with clients. Consequently, compliance personnel need to remain alert as to these social media forums while taking into consideration regulatory guidance in this ever expanding area. It is important to develop a strong social media risk management program with active oversight. ♦

15 FINRA Quarterly Disciplinary Review (Apr. 2015) at <http://www.finra.org/sites/default/files/Quarterly-Disciplinary-Review-April-2015.pdf>.