

# **SIFMA Social Media and Digital Marketing Seminar**

## **Compliance Questions and Challenges**

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# SOCIAL MEDIA EXPLAINED

TWITTER I'M EATING A #DONUT

FACEBOOK I LIKE DONUTS

FOUR SQUARE THIS IS WHERE  
I EAT DONUTS

INSTAGRAM HERE'S A VINTAGE  
PHOTO OF MY DONUT

YOU TUBE HERE I AM EATING A DONUT

LINKED IN MY SKILLS INCLUDE DONUT EATING

PINTEREST HERE'S A DONUT RECIPE

LAST FM NOW LISTENING TO "DONUTS"

G+ I'M A GOOGLE EMPLOYEE  
WHO EATS DONUTS.

# The Regulatory Environment

- FINRA
  - Applies to broker-dealers
  - *Regulatory Notice 10-06* (January 2010)
  - *Regulatory Notice 11-39* (August 2011)
  - *Regulatory Notice 17-18* (April 2017)
- SEC
  - Applies to investment advisers
  - OCIE Risk Alert (January 2012)
  - IM Guidance Update (March 2014)
- MSRB
  - Applies to Municipal Securities Dealers and Advisors
  - MSRB Regulatory Notice 2017-04
- NLRB General Counsel Reports (Aug. 2011, Jan. 2012, May 2012)
  - Summarize outcomes of social media and networking cases

# Broker-dealers - FINRA Notices 10-06, 11-39 and 17-18

- Central message
  - NASD Rule 2210 applies
    - Content standards
    - Filing and approval
    - Supervision requirements
  - SEC Rule 17a-4 applies
    - Recordkeeping requirements

# Broker-dealers - Capture and Retain

- Firms must capture and retain ALL business communications consistent with SEC and FINRA rules
  - Content
    - If message content makes it a business communication, then the firm must retain it
      - Type of device, device owner, and how the message is sent is *irrelevant*
      - For example: an associate's LinkedIn biography may be a business communication
  - Third-party posts
    - Must retain any third party post if it relates to the firm's "business as such," even if it is not the firm's communication

# Broker-dealers - Supervision

- Firms must provide supervision
  - Before a firm allows an associated person to use a social media site for business purposes, a registered principal must:
    - Review the site
    - Determine that the associated person can and will comply with all applicable rules
    - Review the associated person's proposed use in advance

# Broker-dealers - Supervision (cont'd)

- Unscripted participation in an interactive electronic forum is akin to a public appearance
  - Does not require prior approval, but firms must adopt risk-based supervisory procedures
    - For example: training, post-use review, searches
  - Firms are still required to retain such posts
    - Associated persons should only engage on platforms that the firm is equipped to capture
  - *Compare*: static posting is considered a communication with the public requiring prior supervisory approval

# Broker-dealers - Supervision (cont'd)

- Examples of supervisory compliance:
  - Conducting training, identifying red flags
  - Annual (or more frequent) certifications on policies
  - Random website “spot checks”
- Remember that some communications (e.g. relating to mutual funds, variable annuities or CMOs) also may trigger pre-use or post-use filing requirements



# Broker-dealers - Third-Party Posts, Links, and Websites

- If a third-party posts a business-related communication on an associated person's website:
  - Appropriate response depends on firm policies
    - If allowed, firm must supervise
    - If not allowed, firms often provide a non-substantive pre-approved response statement
    - Pre-approved statements should direct the third party to other firm-approved channels
    - See below for “entanglement” and “adoption” of third-party posts

# Broker-dealers - Third-Party Posts, Links, and Websites (cont'd)

- Co-brands
  - If a firm “co-brands” a third-party site (for example, with a prominently placed firm logo), the firm is responsible for the site’s content
- Hyperlinks
  - If a firm provides a hyperlink in a third-party post or article (knowing the post contains false or misleading information or if the firm had “adopted” or become “entangled” with the content of the post), the firm is responsible for third-party content
    - Firm may be responsible by commenting favorably on and linking to a third-party article
    - Firm is not responsible when they are merely linking a third-party website to a firm webpage (if the firm has a reasonable basis to believe the third-party site has accurate information and does not control that website)

# Investment advisers - Overview

- SEC Guidance – OCIE and IM
  - Applies to investment advisers
    - Content-driven approach
      - Investment Advisers Act of 1940 remains unchanged
  - Potentially conflicting guidance by FINRA
    - Broad implications for “dual registrant” firms that provide both brokerage and investment adviser services
    - Primary area of concern is SEC’s ban on “testimonial advertising” by investment advisers

# Investment advisers - Recordkeeping

- Investment advisers:
  - Must maintain and preserve business-related records covered under advisers Act Rule 204-2(a)(7) or otherwise covered under Rule 204-2
    - Includes, among others: communications relating to investment advice, the movement of cash or securities, order placement/execution, or advertisements
    - Must be maintained and preserved for five years, the first two in an easily accessible place
  - If using third-party storage, Rule 204-2(g) applies

# Investment advisers - Recordkeeping (cont'd)

- Investment advisers compared to broker-dealers
  - Broker-dealers have a broader “business as such” retention requirement
    - In practice, difficult to distinguish from investment adviser retention rules
    - Effect: investment advisers may need to retain all social media communications
  - “WORM” storage requirements not applicable to investment advisers

# Investment advisers - Compliance

- Advisers Act Rule 206(4)-7 requires investment advisers to adopt and implement written policies and procedures that are reasonably designed to prevent, detect, and correct securities law violations
  - Assess policies periodically
  - Be specific
    - Policies should include not only advertisement and general communications, but also social media communications
    - Policies should identify permissible and impermissible forms of social media
    - Address solicitor's social media usage

# Investment advisers - Advertising

- Advisers Act Rule 206(4)-1 treats social media as *advertisements*
  - SEC has interpreted “testimonial” to be a statement of a client’s experience with, or endorsement of, an adviser
  - Since social media is treated like advertisements, the adviser may be held responsible for third-party posts
  - Exception for independent third-party sites where all public commentary is available on a real-time basis
  - Possibly conflicting guidance from FINRA
    - Under FINRA, social media post is more akin to a “public appearance” than an advertisement
    - Under FINRA, third-party posts not attributable unless broker-dealer “adopts” the post or otherwise becomes “entangled”

# Municipal dealers and advisors

- MSRB Regulatory Notice 2017-04 sought comment on amendments to MSRB Rule G-21 (advertising by municipal dealers and MSRB Rule G-40 (advertising by municipal advisors)
  - States that MSRB views social media posts as advertising for the purposes of MSRB rules, but solicits comment on whether MSRB should issue separate guidance for social media
  - Industry has urged MSRB to follow FINRA guidance
  - MSRB has not issued final rule



# National Labor Relations Board

- NLRB's General Counsel issued three reports addressing the lawfulness of social media policies and employee discipline
- Two main points:
  - Employer policies should not be so sweeping that they prohibit activity protected by federal labor law (such as discussion of wages or working conditions)
    - Undefined terms like “appropriate” and “professional” or other blanket restrictions can be reasonably construed to violate an employee's rights under Section 7 of the NLRA
  - An employee's social media activities are generally not protected if they are mere gripes not made in relation to group activity among employees
    - This area of law is unsettled: the line between gripes and protected concerted or group activity is blurred
    - For example, an employee's Facebook comment complaining about workplace terms and conditions may be protected, depending on coworker response

# Best Practices - Set Specific Communication Goals

- Determine and specify how social media can further your communication goals
  - Which social mediums?
    - Twitter, Facebook, LinkedIn, YouTube, etc.
  - How to share information?
    - Regular blogging, interactive commenting, static information
  - Who at the firm is authorized to use social media?
    - How is it supervised?
  - Who will be permitted to view the social media?
    - General public vs. restricted to clients

# Best Practices - Set and define specific policies

- Set and define specific policies/procedures
  - How do you intend to capture, retain, and retrieve communications?
    - Use due diligence when hiring outside vendors
  - How to create adequate supervision?
    - Who supervises, and how often
    - Example: limit an associate's communication abilities on a work device
    - Example: associates only permitted to engage on platforms equipped to capture posts

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