

## SEC Staff Provides Guidance to Investment Advisers on the Use of Social Media

In response to the prevalence of social media sites featuring consumer reviews of various types of businesses, on March 28, 2014, the SEC's Division of Investment Management published an IM Guidance Update to address concerns arising from the rating of investment advisers on such social media sites (the "Guidance Update"). Specifically, the Guidance Update clarifies the application of the testimonial rule to social media sites featuring consumer reviews, such as Yelp and Angie's List, and sets forth the parameters for the use of such sites by investment advisers in connection with their marketing materials.

Rule 206(4)-1(a)(1) under the Investment Advisers Act of 1940 prohibits investment advisers from using testimonials in their advertisements. The rule does not define "testimonial," but, as noted in the Guidance Update, the SEC staff has interpreted it to mean "a statement of a client's experience with, or endorsement of, an investment adviser." The Guidance Update states the staff's view that, under certain circumstances, an investment adviser's publication of all of the testimonials about the investment adviser from an independent social media site on the investment adviser's own social media site or website would not implicate the concerns underlying the testimonial rule.

According to the Guidance Update, investment advisers must present testimonials in a content-neutral manner that is not false or misleading (i.e., with positive and negative commentary receiving equal prominence). Further, investment advisers may publish testimonials from a third-party site where the third-party site is independent from the investment adviser and no material connection exists between the two. Describing guidelines similar to those of the Federal Trade Commission on the use of online reviews in advertising, the Guidance Update clarifies that the investment adviser may not directly or indirectly author or edit the commentary on a website, whether in its own name or anonymously, and may not compensate an author of commentary or suppress publication of all or part of the commentary.

The Guidance Update notes that while investment advisers must publish the totality of a third-party site's testimonials, such testimonials may be posted in a manner that allows users to sort based on different criteria. According to the Guidance Update, neither the independent social media site nor the investment adviser may provide subjective analysis of the commentary. The presence of an investment adviser's advertisement on a third-party site also does not render use of that site's testimonials false or misleading, provided that the advertisement is easily recognizable as a sponsored statement.

The Guidance Update also states that investment advisers may publish testimonials that include a mathematical average of the public commentary, but fails to explicitly answer the question of whether investment advisers may simply include in their advertising the ratings they receive, without including the corresponding public reviews. Despite silence on the issue in the Guidance Update, it is likely that the inclusion of such ratings is permissible, with appropriate cross-references and disclosure, much as firms currently advertise Morningstar ratings.

Given the relative lack of consumer review sites that rate investment advisers, in the short term the Guidance Update will not have an immediate impact on most firms.

Advisers that have not already adopted policies that prohibit anonymous posting regarding the firm by supervised persons should consider doing so, now that the staff has stated that anonymous posting, directly

or indirectly, of comments on a website by an investment adviser may violate the testimonial rule, even though monitoring and enforcing compliance with such policies presents many challenges.

We note that the Guidance Update is part of a program of informal guidance from the SEC staff, and as such does not have the same force as decisions by the SEC Commissioners or formal rulemaking. The Guidance Update can be found [here](#).