Bloomberg BNA

Social Media Law & Policy Report™

FINANCIAL SERVICES

Social media has the potential to revolutionize communications by financial services firms with investors and clients. The authors highlight 10 important issues firms should consider in 2013 as they expand their presence on social media.

This article is part of a Social Media Law & Policy Report *series on social media developments in 2013 in selected industries and practice areas.*

Ten Things to Know About Social Media in the Financial Services Industry in 2013

BY RAJIB CHANDA AND TODD MENSZAK

In our experience, in the past year, financial service firms have greatly expanded their presence on interactive web forums commonly referred to as social media. While social media has the potential to revolutionize communications with investors and clients, financial services firms have, for the most part, used social media in much the same way that those firms have used more traditional avenues of communication, such as print, e-mail, and web communications. A continuing challenge in 2013 and beyond will be identifying appropriate uses of social media that go beyond traditional advertising and branding to the types of communications only social media permits—creating communities within third party sites, facilitating live search regarding the firm, and enabling public customer service,[1] while still complying with the myriad rules and regulations that apply. Here are ten things to know about social media in the financial services industry in 2013.

Rajib Chanda, a partner with Ropes & Gray in Washington, focuses on investment management and securities law. He counsels investment advisers, registered investment companies (open-end mutual funds, exchange-traded funds, and closed-end funds), and private funds on transactional, regulatory, and compliance matters. Chanda also counsels investment advisers, boards of directors, and asset management firms on the use and appropriate application of social media tools. Todd Menszak is an associate in Ropes & Gray's corporate department in New York.

1) Individual Employees' Business Use of Social Media.

One key issue in 2013 will be the continued expansion of firms permitting individual employees to use personal social media sites for business use. Based on our clients' experience, social media is more effective when people trust the speaker—something that's much more likely to happen when the speaker is a person rather than a corporate entity. However, due to legitimate compliance concerns, many financial services firms have not, to date, permitted employees to use social media on personal accounts for business purposes.

[1] This categorization of the four primary uses for social media – branding, building communities, facilitating live search, and enabling public customer service – was developed by Rajib Chanda, one of the co-authors, in conjunction with Kathie Legg, who was formerly the senior social media manager for Obama for America.

 ISSN

Every firm should develop a clear policy on whether employees can use personal devices and personal social media accounts for business-related communications, and which (categories of) employees may do so. While the Financial Industry Regulatory Authority (FINRA) and the U.S. Securities and Exchange Commission (SEC) leave it within the discretion of the firm, they seem to encourage businesses to require employees to separate personal devices and accounts from business ones.[2] Where employees cannot use social media for business purposes on personal devices or accounts, the firm is less likely to be entangled in employees' personal affairs. However, if employees are appropriately on notice that personal communications on sites used in part for business purposes are subject to review, firms may choose to accept some level of such entanglement to further the business purposes that underlie personalized social media interaction.

Each firm's policy should also address the types of business communications or content that is permitted on personal social media sites, if any. Some firms require employees to respond to business-related messages received on personal devices or accounts with a non-substantive response or a pre-approved statement that directs the inquiry to other firm-approved media outlets (at least potentially due to recordkeeping concerns). Other firms permit employees to post ''business card information'' on a specific site but prohibit employees from conducting firm business on such site.[3] Such requirements must, of course, stay within the legal guidelines for acceptable limits on employee speech.

2) Advertising.

While social media provides firms with an outlet for unlimited, (mostly) free advertising and brand promotion, it is subject to the same antifraud provisions that apply to traditional advertising. FINRA rules prohibit firms from posting any untrue or misleading statements and require that communications must be fair and balanced.[4] In addition, firms may not establish links to third-party sites that the firm knows or has reason to know contain false or misleading content. Similarly, under SEC rules, advertisements may not contain any untrue statements of material fact or be otherwise false or misleading.[5] The SEC will apply a facts and circumstances test to determine if marketing materials violate this provision.[6]

Traditionally, advertising communications (*e.g.*, statements regarding performance) have been augmented by fulsome disclosure placing the statements in context, through footnotes and otherwise. Some social media sites, however, limit significantly the length of the content that can be posted (most notably, of course, Twitter), and, more generally, social media sites are not well-designed for the inclusion of such disclosure. This makes it quite a bit more difficult to determine whether a statement is placed in appropriate context. Both FINRA and the SEC encourage firms to adopt a specific social media advertising policy rather than relying on the firm's existing advertising and marketing policies, which may not accurately and consistently address the unique risks presented by this new form of advertising.[7]

As firms use social media for communications that are not simply intended to be advertisements (for instance, for customer service), firms should carefully consider whether certain types of communications (*e.g.*, customer service-related responses) even fall into the category of ''advertising'' and, if not, whether other standards of review might apply.

3) Static vs. Real-Time Communications.

Rules regarding supervision and approval of communications differ depending on whether the content is considered ''static'' or ''real-time.'' Both FINRA and the National Association of Insurance Commissioners (NAIC) recognize this distinction.[8] As firms become more active on social media, however, it may increasingly appear that a greater and greater percentage of social media communications are real-time, given the fast-moving nature of the communication.

Under FINRA guidance, ''static'' content (*e.g.*, a Facebook or LinkedIn profile) posted to social media sites must be pre-approved by a firm principal before it is posted. ''Real-time'' communications (*e.g.*, a responsive Facebook wall post or responsive tweet) are not required to be pre-approved by a registered principal prior to use. However, firms still must supervise all of these communications.[9]

Interactive content can become static content if it is re-posted to a static area of a website or blog. In these instances, the pre-approval rules for static communications would apply. Opinions differ as to whether Facebook ''status updates,'' for example, constitute static content or real-time communications. On certain social media sites, real-time communication is encouraged, but search functionality allows those posts to be seen going forward. Examples of such sites include ''question and answer'' sites, such as Yahoo! Answers and Quora. On those sites, real-time communications can become static communications, and the existing guidance does not provide a clear answer for whether posts on such sites require pre-approval.

4) Suitability.

In light of the public nature of social media, firms should be mindful not to violate suitability requirements (*i.e.*, requirements that all recommendations be suitable for each customer). As customers become more

[2] *See* SEC, Office of Compliance Inspections and Examinations, National Examination Risk Alert: Investment Advisor Use of Social Media 5 (Jan. 4, 2012), http://www.sec.gov/about/offices/ocie/riskalert-socialmedia.pdf [hereinafter SEC Risk Alert]; FINRA, Regulatory Notice 11-39, at 7 (Aug. 2011), http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p124186.pdf.

[3] SEC Risk Alert, *supra* note 2, at 5.

[4] *See* FINRA Rule 2210(d)(1)(A).

[5] *See* 17 C.F.R. § 275.206(4)-1(a)(5) (2012).

[6] *See, e.g.*, Covato/Lipsitz Inc., SEC No-Action Letter (Oct. 23, 1981); Edward F. O'Keefe, SEC No-Action Letter (Apr. 13, 1978); Anametrics Investment Management, SEC No-Action Letter (May 5, 1977).

[7] *See* SEC Risk Alert, *supra* note 2, at 2-5; FINRA, Regulatory Notice 10-06, at 4 (Jan. 2010), http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p120779.pdf.

[8] *See* Regulatory Notice 10-06, *supra* note 7, at 5; Nat'l Ass'n of Ins. Comm'rs, The Use of Social Media in Insurance 4-5 (Dec. 20, 2011), http://www.naic.org/documents/committees_d_social_media_exposures_111201_whitepaper_draft_social_media.pdf.

[9] *See* Regulatory Notice 10-06, *supra* note 7, at 5.

  ISSN

accustomed to interacting with financial services firms through social media, the likelihood that customers will ask questions that raise suitability concerns increases.

Both FINRA and the SEC have encouraged firms to prohibit all social media communications that recommend a specific investment product, if the firms are not certain that the recommendation is suitable for every potential member of the audience.[10] To this end, FINRA encourages firms to require a principal's preapproval for any social media communications that recommend a specific investment product (and accompanying links).[11] A majority of registered investment advisers have taken this advice even further, according to the SEC, and prohibit the posting of recommendations or information on specific products or services.[12]

Firms should be particularly careful when using ''question and answer'' social media sites. Firms should also be careful about permitting direct messaging as a way to avoid the issues with suitability for wider audiences. Because much of the direct messaging functionality on social media sites is itself limited in size, appropriate disclaimers may not be possible, and maintaining records may also be difficult.

5) Third-Party Posts.

Firms that allow for third-party postings on their social media pages (*e.g.*, allowing third parties to write on the firm's Facebook wall) should consider having policies and procedures regarding such posts. FINRA and NAIC have both taken the position that posts by third parties are not considered communications by the firm unless the firm has ''adopted'' or ''entangled'' itself in the content.[13] A firm ''adopts'' content by involving itself in the preparation of the content and becomes ''entangled'' where it explicitly or implicitly endorses or approves the content. A firm may, of course, choose to adopt or become entangled with a third-party post that does not violate any rules or regulations.

FINRA has provided much more guidance on this topic than the SEC, which is more focused on how registered investment advisers handle testimonials (see discussion below). However, the entanglement and adoption theories provide a useful framework for registered investment advisers as well.

Policies regarding third-party posts differ by firm. Some firms have prohibited third-party posts entirely, while others have allowed such posts, provided that they do not cause the firm to violate the federal securities laws. In an attempt to avoid having third-party posts attributed to the firm, many firms post prominent disclaimers on their social media profiles stating that they do not approve or endorse any third-party posts, but these will only constitute parts of the facts and circumstances that FINRA would consider in determining if a firm had become entangled with or adopted third-party content that violates its rules. Firms will also usually want to delete inappropriate or harassing third-party posts, which they are permitted to do under the 1996 Communications Decency Act, and will need to consider whether they have sufficient and appropriate resources to remove such material (or posts that arguably cause the firm to violate securities laws) on a timely basis.[14]

6) Testimonials.

A continuing tricky issue for financial services firms is when interactive activities by third parties become ''testimonials'' for purposes of the Investment Advisers Act or FINRA rules.[15] Under the Investment Advisers Act, testimonials about products or services are prohibited; under FINRA rules, testimonials about investment advice or performance require fulsome accompanying disclosures. While it is difficult to claim that unsolicited third party testimonials housed on third-party sites are testimonials, most firms are understandably wary of turning a blind eye to the issue, and therefore monitor sites carefully. This is further complicated by the fact that, on many sites, firms do not have the power to delete others' posts (like an @-tag on Twitter directed to a firm). The SEC has in fact suggested that actions, and not just words, can function as testimonials, claiming that in certain circumstances third-party use of certain social media plug-ins, such as the ''Like'' feature on a registered investment adviser's Facebook page, could be deemed an explicit or implicit statement of a client's experience with that adviser.

Given that the ''Like'' function is the only way for a follower to regularly get updates from a firm's Facebook feed, the SEC's views could effectively prohibit the use or usefulness of Facebook for registered investment advisers. It seems more likely, however, that the agency only prohibits registered investment advisers from soliciting ''likes'' regarding the adviser's specific products and services. Given that the line between typical social media interaction and prohibited activity, in this regard, is a fine one at times, firms will need to continue to consider these issues carefully in 2013.

Firms should empower several administrators with the ability to delete any posts that are close to the line and provide those administrators with in-depth training, including examples of prohibited testimonials.

7) Recordkeeping Responsibilities.

It is important to remember, especially as regulators pay increasingly close attention to social media activity, that recordkeeping is a *sine qua non* of any effective social media policy. A policy that is perfectly designed to comply with all of the content standards and prohibitions under the relevant regulations that cannot demonstrate that compliance is inherently inadequate. Recordkeeping violations are also low-hanging fruit for regulators—they are fairly clear and easy to detect, and they are the type of basic requirement with which a regulated entity should be able to comply. Of course, when it comes to social media, that is often easier said than done.

As an initial matter, firms should have clear policies to determine whether a communication made on social media is a required record. For example, when an associated person posts autobiographical information (*e.g.*, place of employment or job responsibilities), such information arguably constitutes a business communication triggering a recordkeeping requirement. Other types of communications, and communications received by the

[10] *See id.* at 4; *see also* SEC Risk Alert, *supra* note 2, at 3.
[11] *See* Regulatory Notice 10-06, *supra* note 7, at 4.
[12] *See* SEC Risk Alert, *supra* note 2, at 3.
[13] *See* Regulatory Notice 10-06, *supra* note 7, at 7-8; The Use of Social Media in Insurance, *supra* note 8, at 5.
[14] 47 U.S.C. § 230 (2006).
[15] *See* 17 C.F.R. § 275.206(4)-1(a)(1) (2012); FINRA Rule 2210(d)(6).

firm, might not be required records (although, for instance, FINRA requires that certain ''customer complaints'' be kept).[16]

If a communication is a required record, it must be maintained in an easily accessible manner: broker-dealers must maintain such records for not less than three years, and registered investment advisers must maintain them for not less than five years. If records are maintained electronically, they must be kept in a format that allows for them to be arranged and indexed. However, when those records are created on third-party platforms, it may prove difficult to arrange and index materials appropriately.

The use of social media on personal devices presents a recordkeeping challenge. Firms should consider using third-party software or developing internal software to maintain records, especially given the volume of records that can be created. Firms should also set a clear policy on whether to maintain records of deleted posts (for instance, third-party posts) that might be required records. Especially to the extent that recordkeeping is not automated, they should train their employees on recordkeeping requirements and periodically test employees' compliance with such programs (to determine, for example, whether employees are inadvertently destroying required records).

8) Policies and Procedures.

To the extent financial services firms have not done so already, we would expect that by the end of 2013 most firms will have adopted policies and procedures regarding social media usage, even if it is simply a policy that prohibits the use of social media by supervisory employees for business purposes.[17] While FINRA and the SEC both strongly recommend that social media policies be tailored specifically to an individual firm, the SEC has taken the additional step of encouraging firms to develop a policy dedicated solely to social media compliance.[18] We believe that every firm using social media should adopt and periodically review the effectiveness of policies and procedures regarding social media. Each policy should be tailored to the specific firm, the specific facts and circumstances, and the firm's specific business purposes.

The policies should also address which specific social media sites are permissible for business use and whether such sites can also be used by a firm's solicitors. Depending on the business purposes for which a firm might use social media and the firm's business, policies should address issues that go beyond those identified by the SEC and FINRA, both of which assume that the primary business purpose of social media use is advertising. Other issues the policies and procedures might potentially address include customer privacy, intellectual property and forward-looking statements, and, as mentioned below, Regulation Fair Disclosure (Regulation FD) disclosures and maintenance of private placement exemptions, among others.

9) Training and Supervision.

In addition to adopting specifically tailored social media policies, firms must also train and supervise their employees to ensure compliance, especially if individual employees are allowed to use personalized social media pages for business use. FINRA and the SEC strongly encourage firms to properly train employees on social media communications before they are authorized to use social media for business purposes and to encourage periodic certification of their employees' compliance.[19] Firms should limit such use to employees who have been properly trained and authorized. Firms should consider requiring each associated person who uses social media on behalf of the firm to certify their compliance with the firm's policies on an annual or more frequent basis.

Whatever procedures are adopted, the firm must properly supervise social media interactions to ensure that such communications do not violate FINRA or SEC rules. As a general matter, supervision policies regarding social media should also cover issues related to other securities laws, such as insider trading and private placement exemptions. For example, the SEC recently warned Netflix that it may file civil claims or seek a cease-and-desist order against the company for a Facebook post congratulating employees on the number of hours of video that customers of the site had watched the previous month.[20] The SEC is concerned that the post violated Regulation FD, which requires companies to announce material information to all investors at the same time.[21]

The SEC suggests that firms should consider requiring pre-approval rather than relying solely on post-use supervision. The SEC leaves it within the discretion of the registered investment adviser to mandate any pre-approval requirements as part of its social media policy. According to the SEC, ''[t]his determination could depend on the volume and pace of communications posted on a site or the nature of, and the probability to mislead contained in, the subject matter discussed in particular conversation streams.''[22] The SEC suggests that all posts might require pre-approval, if post-use review would not be reasonable under the circumstances.

For many firms, pre-approval would frustrate the business purpose of social media. Training and supervision are therefore key. To monitor social media use, a firm may consider using sampling, spot checking, lexicon-based methodologies, or a combination of methods.

10) Innovation.

Social media platforms are constantly innovating. Their functionality changes; new sites rise in popularity. A firm's social media policy is therefore always a

[16] FINRA Rule 4513.

[17] Several advisory opinions by the National Labor Relations Board suggest, however, that certain prohibitions for certain classes of employees may be impermissible from an employment law perspective. *See, e.g.*, NLRB, Memo. OM 11-74, Report of the Acting Gen. Counsel Concerning Social Media Cases (Aug. 18, 2011); NLRB, Memo. OM 12-31, Report of the Acting Gen. Counsel Concerning Social Media Cases (Jan. 24, 2012); NLRB, Memo. OM 12-59, Report of the Acting Gen. Counsel Concerning Social Media Cases (May 30, 2012).

[18] *See* SEC Risk Alert, *supra* note 2, at 2-5.

[19] *See id.*, at 4; Regulatory Notice 11-39, *supra* note 2, at 5.

[20] *See* Netflix Inc., Current Report (Form 8-K) (Dec. 5, 2012); *see also* Michael J. De La Merced, *S.E.C. Warns Netflix Over a Post on Facebook*, N.Y. Times Dealbook (Dec. 6, 2012, 5:53 PM), http://dealbook.nytimes.com/2012/12/06/s-e-c-weighs-suit-against-netflix-over-improper-disclosure/.

[21] Regulation FD, 17 C.F.R. pt. 243 (2012).

[22] *See* SEC Risk Alert, *supra* note 2, at 3-4.

  ISSN

work in progress. Indeed, the SEC has indicated that a firm has a ''continuing obligation to address any upgrades or modifications to the functionality that affect the risk exposure for the firm or its clients.''[23] New functionality in approved social media sites may require new training, updated policies, and even considerations as to whether the firm's participation on such sites is still appropriate.

[23] *See* SEC Risk Alert, *supra* note 2, at 4.

Firms need to be continually looking forward to best unlock social media's potential. The guidance offered by regulatory authorities permits a great deal of experimentation among industry participants as uses for social media evolve. Regulatory requirements should not hinder experimentation, but firms must commit appropriate resources to compliance. By having specific business goals and understanding how the regulatory backdrop affects those goals, firms will be better suited to address where the risks lie and how best to navigate them.