

Advanced Regulatory Compliance, Inc.

Industry White Paper Series

Navigating the Social Media Storm:

Creating a Social Media Compliance Policy During a Time of Uncertainty



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Introduction

As part of our ongoing commitment to provide the financial services industry with innovative educational content, [Advanced Regulatory Compliance, Inc.](#) is pleased to launch the first in a series of industry white papers that have been specifically developed for financial advisors.

This paper provides a detailed analysis of Social Media, including its history, how it relates to financial advisors, and the impact that it has on meeting the SEC's compliance expectations for independent Registered Investment Advisors (RIA).

Developed in partnership with [Nexus Strategy, LLC](#), a leading consulting firm to the wealth management industry, this report will highlight the current industry issues with social media, offer suggestions on how RIAs can tackle the structuring and execution of a Social Media Policy, and how arming your company with such a policy can protect and grow your firm going forward.

We invite you to learn more about the industry's important compliance, regulatory, and legal issues by logging on to our web site at www.advreg.com or that of our affiliated company, The Law Office of Patrick J. Burns, Jr. at www.pjblawoffice.com.

Executive Summary

“Ignoring growing social media related compliance issues is a gamble and can leave your firm exposed to the risk of penalties, reputational harm, or worse.”

The need for a Social Media Policy in every advisor’s compliance manual has been growing rapidly over the past decade as Social Media channels have become not only commonplace, but also a necessary part of our personal and business lives.

Social Media has become so universal that even if your firm refuses to formally participate with an official Facebook page or a company blog, for example, it will still need a policy in place to address any potential issues that fall within the realm of social media, including employees’ personal use of social media or maintaining your RIA’s web site.

RIA policies and procedures are the foundation of SEC compliance programs. Ignoring growing social media related compliance issues is a gamble and can leave your firm exposed to the risk of administrative penalties, reputational harm, or worse. If your firm has forbidden Social Media use, advisors will still need to develop a policy to state that they do not allow the use of social media, and will be well-advised to take reasonable steps to ensure the firm’s associates are adhering to firm policy.

While there has been no formal guidance by the SEC on Social Media policies and procedures, their recent, purported Social Media sweep letter can be used in conjunction with guidance from FINRA to create a logical Social Media policy.

By leveraging existing technology solutions, advisors can implement an archival, monitoring, and tracking system to ensure that any Social Media use can be captured and produced on demand for any future audits or compliance mandates.

Advisors need to take action on this issue now, not only from a firm protection and risk management point of view, but also from a long-term growth and business development opportunity. The rise of social media as the way people and businesses communicate will not stop and it will be the progressive firms that adapt to this new paradigm to create a long-term, competitive advantage.

Background and History of Social Media

“The uses of Social Media are limitless but the most common and effective function for most advisors is utilizing it for marketing purposes, such as a company web site.”

Social Media is an ever-increasing outlet for communicating information to both small and large audiences. No-cost, interactive forums in which fast-paced and effortless communication is possible, account for the unprecedented spike in Social Media use.

Social Media has been defined as forms of electronic communication (such as web sites for social networking and micro blogging) through which users create online communities to share information, ideas, personal messages, and other content (such as videos).¹

A likely reason that the Social Media Interface has succeeded is that it eliminates any anxiety or awkwardness that can come from communicating in person or even through the phone. Social Media communication sets up a faceless boundary through which we are afforded the luxury of censorship and saved from implicit judgments about our composure, handshake, eye contact, and overall appearance made when face-to-face. Another benefit to socializing through the Internet is that most of what you write can be edited.

Interestingly, Social Media had its beginnings in dating sites and chat rooms, and with the introduction and expansion of each new quasi-revolutionary social networking site comes the obsolescence of its predecessor: High5 conceded to Livejournal, while Six Degrees gave way to MySpace, and now Twitter, Facebook and LinkedIn rule the social networking world. The turn of the 21st century brought with it major advances in social networking sites and now there is a site for virtually every specialized social networking need.

The uses of Social Media are limitless but the most common and effective function of Social Media for most advisors is utilizing it for marketing purposes, such as setting up a company web site. The first place a potential client or any other interested party makes inquiries into a company is through a quick online search. As a result, the SEC has acknowledged this point and created guidance for advisors.

According to an excerpt from the [47-page report](#) on guidance that the SEC released in 2008,

“A company’s web site is an obvious place for investors to find information about the company, and a substantial majority of large public companies already provide access to their Commission filings through their web sites.”

¹ <http://www.merriam-webster.com/dictionary/social%2Bmedia>

However, the SEC's advertising rules are stringent when reviewed in light of advisor's web sites. These strict rules discourage creative pursuits that make your company's site stand out among other tedious, formulaic sites and need to be actively monitored, archived and be able to be produced on demand for routine audit purposes.

While there has not been any formal guidance from the SEC on Social Media use, it should only be a matter of time before the SEC releases a comprehensive guide. Until then, there is a gap in compliance programs that advisors need to manage. Unclear guidance from the SEC creates a challenge for advisors to navigate, however, there are existing industry resources that can serve as guides for Social Media use. Combined with knowledgeable legal counsel, advisors can develop social media policies to protect their firms during this unique time.

Current SEC focus on Social Media use by Advisors

Nearly three years ago, [the commission released guidelines](#) regarding web site use as a response to the rapid increase of company web pages in the early 2000s.² Specifically, the report covered information posted on the sites, including hyperlinks to 3rd party information and interactive features. Now, in 2011, there has been widespread speculation that the SEC is honing in on Social Media policies and allegedly sending out and circulating Sweep Letters regarding companies' involvement with Social Media.

In 2008, the SEC decided to acknowledge company web sites and other forms of Social Media as legitimate sources for RIAs to meet public disclosure requirements under Regulation Fair Disclosure (FD). The SEC's decision was essentially an acceptance that utilizing Internet technology is an efficient way to communicate with clients, prospects, and the industry.

Although having an online presence and communicating through the web is routine, the line between having a personal and a business voice has been blurred.

² <http://www.sec.gov/rules/interp/2008/34-58288.pdf>

“Therefore it is paramount that companies place an experienced individual in charge of their online representation.”

Therefore it is paramount that companies place an experienced individual in charge of their online representation. The company CCO should give prior approval for all communication and advertising that occurs on the firm’s behalf.

Additionally, while there is a lot of uncertainty about what the SEC’s next move will be in regards to Social Media, what we can be sure of is that now is the time to act by promulgating guidelines in our compliance manuals for Social Media use.

It is incumbent upon advisors to develop a Social Media Policy now. But where do you start?

Purported SEC Sweep Exam

Recently, the SEC was believed to have circulated a Sweep Exam Letter to investment advisors outlining document requests pertaining to Social Media. While the SEC has not yet publically released a Social Media Sweep letter, Advanced Regulatory Compliance has obtained a copy. (See Appendix A).

The main themes addressed in the letter are:

- Retention of Social Media documents,
- Policies and procedures concerning Social Media,
- 3rd party use of Social Media and how it relates to firm,
- Supervision of representatives’ personal use of Social Media,
- Disciplinary actions.

The five themes addressed in the purported Sweep Letter cover the bulk of what is needed for Social Media compliance.

The retention of Social Media documents is crucial to supervision and accessibility and serves as proof of appropriate or inappropriate use of Social Media.

Policies and procedures for Social Media, whether your firm utilizes Social Media or not, are also key as they provide guidelines for your employees on how to exercise compliance while using Social Media outlets.

3rd party use of Social Media tackles the issue of how outsiders use Social Media in relation to your firm, such as the potential occurrence of Testimonials, which requires active monitoring of Social Media outlets to ensure compliance.

“Your firm’s supervision of personal Social Media use is necessary because it addresses the potential issues that can crop up when representatives of your firm are using Social Media in their own time or at work.”

Your firm’s supervision of personal Social Media use is necessary because it addresses the potential issues that can crop up when representatives of your firm are using Social media in their own time or even while at work. The themes in the Sweep Letter are all held together by disciplinary actions which establish the consequences that await any employee willing to misuse Social Media that in any way can be tied back to your firm.

The main issues with implementing a Social Media Policy are the lack of SEC guidance and the genuinely flexible nature of Social Media. For guidance, the aforementioned publication of a 47-page report in 2008 by the SEC as well as FINRA’s [publication of the 10-06](#) which is a regulatory notice of Social Media web sites, can both equip advisors in constructing a workable and compliant Social Media policy. The SEC Sweep Letter should also help in establishing a foundation on which to build your company’s Social Media Policy.

Monitoring Social Media Outlets

The financial advisory sector is not the first to have to respond to growing Social Media use and concerns. Therefore, there are already Social Media policies and software set up to supervise and retain Social Media use which advisors can easily incorporate into their technology and back office systems.

It is important to keep in mind, however, that the SEC does want firm-specific language. Generic templates will not be satisfactory and customizing your firm’s Social Media Policy will be crucial in meeting the SEC’s expectations.³ Every employee, including the firm Principals, should read, acknowledge and sign the Social Media policies and procedures document.

Monitoring Social Media outlets can be as simple as conducting an informed search or as involved as getting into someone’s private account if the account was accessed or stored on the company’s computers.⁴ As a best practice your CCO should periodically examine the Social Media use of your RIA’s employees to ensure that they are abiding by the Social Media Policy they signed.

If the firm actively uses Social Media to advertise and communicate, then all postings and interaction should get prior approval from the firm’s CCO. Additionally, all communication and advertising that goes through the firm should be retained and archived by the CCO. Not only do all interactions regarding Social Media as related to the company have to be documented, they also have to be retained in such a way as to promote fast and easy access for the CCO’s reviewing purposes for a period of at least 5 years.

³ <http://www.riabiz.com/a/29195>

⁴ Unless you have an employee’s explicit consent to access their personal account, you should not do so without first consulting your legal counsel.

Social Media Technology Compliance Solutions

“The key to implementing a Social Media policy is the ability to archive, track and monitor activity.”

The key to implementing a Social Media policy is the ability to archive, track, and monitor activity. With the growing use of Social media, there have been a number of technology solutions that advisors can use to accomplish this mandate.

Advisors can take advantage of these tools to automate the capturing of Social Media activity through Enterprise Content Management (ECM) systems as well as through specific applications like Application Programming Interfaces (API) that are integrated into major social networking sites such as Facebook, Twitter, and LinkedIn.

As part of your Social Media policy, leveraging these tools to provide you with the ability to produce on demand your firm’s use of Social Media will be a critical component for compliance, particularly during this time period where there has not been clear guidance from the SEC.

Advisors can look to the many expert technology consultants and technology reporters in the industry, as well as discuss potential technology solutions with their custodian, broker-dealer or other financial institution.

Testimonials

Advisors are generally prohibited from providing or receiving a referral to or from any person on their social network, because doing so may be considered prohibited testimonial under the federal securities laws.

There are some sites such as Yelp or Google which are set up as reference points for clients, on which they are allowed to share past experiences which include referrals, yet there is no way for an advisor to censor either site. Advisors should exercise due diligence in discouraging their clients from making public appearances on their behalf and restrict and delete such appearances when possible.

Although advisors can discourage clients from posting testimonials and ask them to remove any that they post of their own accord, ultimately, clients are free to do what they want. Keep in mind, however, that the SEC will take a hard and serious look at advisors who have numerous testimonials but claim no involvement with them being posted.

Sample Social Media Policy

“By fully describing how firms will address each of these areas, advisors should be well-equipped to navigate the use of Social Media in these uncertain times.”

The following is an example of the contents and topical areas that should be contained in a Social Media policies and procedures document. While this is for illustration purposes only, it can serve as a guide and outline for what areas advisors need to focus on when creating a Social Media policy.

By fully describing how firms will address each of these areas, advisors should be well-equipped to navigate the use of Social Media in these uncertain times.

Social Media Policy

- Purpose
- Responding to statements or claims made on Social Media sites about [Firm Acronym]
- Third-Party Posts
- Testimonials
- Solicitation
- Advertising and Marketing
- Real-Time Interactive Forums
- Personal Use of Social Media Sites
- Enforcement

Conclusion

“Those that do implement a Social Media policy will be well-positioned to manage their business and regulatory risk while reaping the rewards that Social Media can bring.”

Social media is a growing phenomenon that is having a dramatic impact on all aspects of personal and business communications. Advisors need to take action now and update their Compliance Programs with policies and procedures on the use of Social Media. Despite the lack of guidance from the SEC, advisors can look to industry resources and leverage technology to create workable policies and procedures to be able to archive and produce on demand any Social Media use in order to meet compliance requirements. Those that do implement a Social Media policy will be well-positioned to manage their business and regulatory risk while reaping the rewards that Social Media can bring.

Appendix A: Purported SEC Sweep Letter

DOCUMENTS TO BE PRODUCED

Please produce the following documents within [Adviser]'s possession or custody or subject to [Adviser]'s control for the period January 1, 2010 to the present:

1. All documents sufficient to identify [Adviser]'s involvement with or usage of social media web sites, including, without limitation:
 - a. Facebook; b. Twitter, including, without limitation, AdvisorTweets.com; c. LinkedIn; d. LinkedFa; e. YouTube; f. Flickr; g. MySpace; h. Digg; i. Reddit; RSS; and j. Blogs and micro-blogs.
2. All documents concerning any communications made by or received by [Adviser] on any social media web site, including, without limitation, snapshots of documents responsive to Item 1, above;
3. All documents concerning [Adviser]'s policies and procedures related to the use of social media web sites by [Adviser], including, without limitation: a. All policies and procedures concerning any communication posted on any social media web site by [Adviser]; b. All policies and procedures concerning any prospective communications to be posted on any social media web site by [Adviser]; and c. All policies and procedures concerning any ongoing monitoring or review process related to communications posted on any social media web site by [Adviser];
4. All documents concerning [Adviser]'s policies and procedures concerning a third party's use of any social media web site maintained by [Adviser], including, without limitation: a. All policies and procedures concerning any communication posted by a third party, including, without limitation, actual or prospective clients of [Adviser], on any social media web site maintained by [Adviser]; b. All policies and procedures concerning any approval processes for prospective communications to be posted by a third party, including, without limitation, actual or prospective clients of [Adviser], on any social media web site maintained by [Adviser]; and c. All policies and procedures concerning any ongoing monitoring or review processes related to communications posted by a third party, including, without limitation, actual or prospective clients of [Adviser], on any social media web site maintained by [Adviser];
5. All documents concerning [Adviser]'s policies and procedures related to the use of social media web sites by [Adviser]'s personnel for personal, non-business related matters;
6. All documents concerning [Adviser]'s personnel training and education related to the use of social media web sites by [Adviser], whether for personal, non-business related, or business related matters;
7. All documents concerning any informal or formal disciplinary action of [Adviser]'s personnel related to the use of social media for personal, non-business related, or business-related reasons;
8. All documents concerning [Adviser]'s record retention policies and procedures concerning the involvement with or usage of, whether for personal, non-business related, or business-related matters, any social media web site maintained by [Adviser] by: a. [Adviser]; b. [Adviser]'s personnel; or c. any third party.

Appendix B: Advertisements by Investment Advisers

Rule 206(4)-1

It shall constitute a fraudulent, deceptive, or manipulative act, practice, or course of business within the meaning of section 206(4) of the Act for any investment adviser registered or required to be registered under section 203 of the Act, directly or indirectly, to publish, circulate, or distribute any advertisement:

1. Which refers, directly or indirectly, to any testimonial of any kind concerning the investment adviser or concerning any advice, analysis, report or other service rendered by such investment adviser; or
2. Which refers, directly or indirectly, to past specific recommendations of such investment adviser which were or would have been profitable to any person: *Provided, however,* That this shall not prohibit an advertisement which sets out or offers to furnish a list of all recommendations made by such investment adviser within the immediately preceding period of not less than one year if such advertisement, and such list if it is furnished separately: (i) State the name of each such security recommended, the date and nature of each such recommendation (e.g., whether to buy, sell or hold), the market price at that time, the price at which the recommendation was to be acted upon, and the market price of each such security as of the most recent practicable date, and (ii) contain the following cautionary legend on the first page thereof in print or type as large as the largest print or type used in the body or text thereof: "it should not be assumed that recommendations made in the future will be profitable or will equal the performance of the securities in this list"; or
3. Which represents, directly or indirectly, that any graph, chart, formula or other device being offered can in and of itself be used to determine which securities to buy or sell, or when to buy or sell them; or which represents directly or indirectly, that any graph, chart, formula or other device being offered will assist any person in making his own decisions as to which securities to buy, sell, or when to buy or sell them, without prominently disclosing in such advertisement the limitations thereof and the difficulties with respect to its use; or
4. Which contains any statement to the effect that any report, analysis, or other service will be furnished free or without charge, unless such report, analysis or other service actually is or will be furnished entirely free and without any condition or obligation, directly or indirectly; or
5. Which contains any untrue statement of a material fact, or which is otherwise false or misleading.

For the purposes of this section the term *advertisement* shall include any notice, circular, letter or other written communication addressed to more than one person, or any notice or other announcement in any publication or by radio or television, which offers (1) any analysis, report, or publication concerning securities, or which is to be used in making any determination as to when to buy or sell any security, or which security to buy or sell, or (2) any graph, chart, formula, or other device to be used in making any determination as to when to buy or sell any security, or which security to buy or sell, or (3) any other investment advisory service with regard to securities.

About Advanced Regulatory Compliance, Inc.

Patrick J. Burns, Jr., is the president of [Advanced Regulatory Compliance, Inc.](#) and also managing attorney with [The Law Offices of Patrick J. Burns, Jr., P.C.](#) He is a member of the California, New York and New Jersey Bars, and received his Juris Doctorate degree from Southwestern University School of Law in Los Angeles, California and Bachelor of Business Administration degree from Pace University's Lubin School of Business in Pleasantville, New York. Mr. Burns began his professional career with a New Jersey based law firm and then worked in a legal/compliance capacity for several financial services firms located in New York City and Los Angeles. During his financial services career, he acquired numerous FINRA and insurance licenses. Mr. Burns is a frequent industry speaker and a member of the Financial Planning Association and the Southern California Compliance Group.



415 N. Camden Drive, Ste. 223
Beverly Hills, CA 90210
<http://www.advreg.com>

Tel: (310) 275-7300
Fax: (310) 275-7305
info@advreg.com