

INVESTMENT ADVISER SOCIAL MEDIA RISK ALERT: YOU MAY NOT “LIKE” THIS

January 19, 2012

To Our Clients and Friends:

On January 4, 2012, the Office of Compliance Inspections and Examinations (“OCIE”) of the Securities and Exchange Commission (the “SEC”) released a National Examination Risk Alert on Investment Adviser Use of Social Media (the “Risk Alert”).¹ The Risk Alert addresses the use by registered investment advisory firms of social media that integrate technology, social interaction and content creation – from blogs, wikis and photo sharing sites, to LinkedIn, YouTube, Facebook and other similar websites.

The Risk Alert serves as a reminder that an investment adviser’s use of social media must comply with, among other things, the antifraud, compliance and recordkeeping provisions of the Federal securities laws, including, the Investment Advisers Act of 1940 (the “Advisers Act”). The Risk Alert sets forth factors that the SEC staff believes, based on observations from recent OCIE exams, an investment adviser may wish to consider in complying with such obligations.

COMPLIANCE POLICIES AND PROCEDURES

The Risk Alert makes clear that registered investment advisers that use social media should adopt and periodically review the effectiveness of compliance policies and procedures regarding social media. The Risk Alert reflects a staff concern that firms may have multiple, overlapping procedures that address advertisements, client communications and electronic communications – which may or may not specifically address the use of social media. In addition, the staff is concerned that many policies do not address the use of social media by third-party solicitors acting on behalf of the registered investment adviser.

The Risk Alert recommends that an investment adviser, when formulating a compliance program with respect to the use of social media, consider adopting, among others things:

- usage guidelines, including appropriate restrictions and prohibitions based on the adviser’s own risk profile and analysis;

¹ Available at: www.sec.gov/about/offices/ocie/riskalert-socialmedia.pdf

- content standards, perhaps articulating whether specific content is prohibited or restricted;
- monitoring policies to police the firm's sites and third-party sites, with particular attention to the frequency of, and resources devoted to, such monitoring;
- content approval processes;
- training and other practices (*i.e.*, periodic employee certifications) that promote compliance; and
- policies with regard to the conduct of business on third-party sites.

Additionally, the investment adviser should evaluate: (i) the functionality of its own social media sites (*e.g.*, whether privacy settings function correctly); (ii) its own information security risks; and (iii) the implications of enterprise-wide sites (*i.e.*, whether advertising practices at the enterprise-wide level could cause the investment adviser itself to violate the Advisers Act).

Finally, the investment adviser should evaluate the extent to which social media postings must be retained as required books and records and whether it has the means to retain them.

TESTIMONIALS?

The Risk Alert seeks to address the issue of when an interaction via social media may turn into a client "testimonial" – that is, a statement of a client's experience with, or endorsement of, an investment adviser. An advertisement that contains a testimonial is prohibited by Rule 206(4)-1(a)(1) under the Advisers Act.

The Risk Alert notes that, depending on the facts and circumstances, certain third-party postings on social media (*e.g.*, posts on a Facebook page or comments to a blog) could be viewed as "testimonials." In particular, the Risk Alert states that something as commonplace in today's world as a client clicking the "like" button on a social media site could be deemed to be a "testimonial" if it is an explicit or implicit statement of the client's experience with the investment adviser – especially when a client or other person is invited to "like" the investment adviser.

The Risk Alert suggests that an investment adviser that allows for third-party postings on its social media sites should consider having policies and procedures concerning such third-party postings, including the posting of testimonials about the firm. As a conservative approach, some investment advisers may consider prohibiting public postings or allowing only authorized users to make such postings. The Risk Alert suggests that where disabling or limiting the "like"

feature or other types of third-party postings is not possible, the investment adviser should “develop a system to monitor and, if necessary, remove third-party postings.”

NEXT STEPS

Investment advisers, including private fund managers, should evaluate the extent to which they or their employees utilize social media and develop appropriate policies and procedures to control its use. In particular, they should evaluate whether they have the technical means and resources to monitor their use of social media. They should also be sensitive to other implications that the use of social media may raise under the Federal securities laws, particularly in connection with the offering of interests in privately offered funds.

While the Risk Alert is based on examinations of registered investment advisers that are required to have compliance policies and maintain books and records, exempt reporting advisers using social media to communicate with U.S. clients or investors may wish to consider some of the SEC staff's concerns.

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