Social Media for Financial Advisors

Crossing the Compliance Hurdle

August 2016
Introduction

The number of rules and regulations governing the financial services industry is astounding. But while these regulations are necessary to protect investors, they present unique challenges to financial services professionals who want to expand their reach with content marketing and social media.

That said, we believe social media is such an effective way for advisors to build their brand and grow their business, it’s worth investing the time and effort into compliance functions in order to leverage these online tools. Moreover, a recent Putnam study found that a record 79% of advisors used social media to grow their business, with an average asset gain of $4.6 million.\(^1\) Clearly, advisors are making it work—to great effect.

This paper provides guidelines on the four most common gray areas advisors encounter in the social sphere: advertising, testimonials, company procedures, and recordkeeping. However, remember that these guidelines are not legal advice and cannot replace professional legal counsel.

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Many of the laws governing social media are the same ones that govern broader communication, which were part of the SEC’s Investment Advisors Act of 1940. The internet was a science fiction fantasy back then, and in the time since, FINRA and the SEC have been regrettably unclear on specific social media policies.

Luckily, there is some guidance on how social media fits into broader communication rules. In 2012, the SEC published the Risk Alert on Investment Adviser Use of Social Media, which helps explain the policies and procedures that firms engaging in social media activities should develop. In addition, the March 2014 Guidance on the Testimonial Rule and Social Media deals more specifically with third-party commentary.

It’s also important to note that since the Dodd-Frank Act raised the asset under management threshold from $25 million to $100 million, the SEC has jurisdiction over large advisory firms while states oversee most small and mid-sized advisors. However, the policies governing communication are extremely similar, so regardless of your size, these guidelines should hold.

Rule 206(4)-1 is the part of the Investment Advisers Act that governs the issuance of advertising materials for advisors. The Act states that if the purpose of a written communication is to offer additional advisory services or attract new clients, it may be viewed by the SEC as an advertisement. In addition to regulating advertising in general, rule 206(4)-1(a)(5) of the Investment Advisers Act bars any false or misleading advertisement in any way. if you wouldn’t put it in an advertisement without disclaimers, don’t put it on social media. This also means that performance information, stock picks, and investment advice aren’t good social media topics. However, if your content is generally not investment-related and doesn’t talk directly about your company or services, you may find that the compliance scrutiny is minimal.

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This presents a quandary for social media usage. Unlike brochures, emails, and print advertising, social media can be a gray area under this rule. For example, if you post recent performance data, that’s clearly an advertisement. But what if you share an interesting article on the economy? What about lighthearted pictures from around the office or your recent vacation? Where do you draw the line?

Since social media profiles are largely public information, if you knowingly publish information about your company, it’s considered advertising. This is not particularly convenient from a publishing standpoint, but also leads to a good rule of thumb:

**Advertising Best Practices:**

- Don’t publish performance data or specific stock or investment recommendations
- Stay away from direct references to your service offerings
- Cross-check your social media profile against your ADV, advisory contract, and website – they should be consistent in content and tone
- Scrutinize your social media accounts to make sure they’re not false or misleading in any way
- Consider adding a disclaimer informing all readers that all content, Likes and followers of the profile should not be considered as advertisements
Testimonials

The SEC interprets the term "testimonial" to include a statement of a client’s experience with, or endorsement of, an investment advisor. Testimonials are prohibited under Rule 206(4)-1(a)(1) of the Investment Advisers Act.

In the traditional print or website setting, these are easy to stay away from—you generally know that the word "testimonial" involves quotes from your clients about how awesome you are, or how easy you are to work with.

Social media pages have the same basic limitations: advisors should not invite clients to post commentary or testimonials on their social media sites in order to avoid express violations of the rule.

That said, there are a few key places where advisors might run into trouble with accidental testimonials when updating their social media accounts.

LinkedIn Endorsements:

Your LinkedIn connections can go to your profile and “endorse” you to let the world know that you’re skilled in Market Analysis or Portfolio Allocation. However, according to the SEC, this is a testimonial. Advisors should not accept or request any such recommendations on LinkedIn, including skill endorsements.

Facebook Likes:

Typically, clients will receive your updates on Facebook by “Liking” your business Page. There are also infinite other opportunities to press the “Like” button on the site. If a client Likes your page or a comment you made, does that constitute some sort of testimonial or vote of confidence? The SEC would say no, so long as the thing being “Liked” doesn’t directly involve your practice or performance. For example, a “Like” on the photo of your recent vacation won’t be misconstrued. On the other hand, you should not solicit Likes based on performance or experience (“Like this photo if you’ve had a great experience investing with us!”).

Third-Party Testimonials:

When you do a good job as an advisor, word gets out. And for the connected advisor, you may stumble across unsolicited endorsements online. For example, if you have a Facebook Page and one of your clients is a follower, you can typically see their profile. When that client has a great experience working with you, they may post an unsolicited recommendation on their own personal profile.

At this point, it might be tempting to take a screenshot, republish the post on your own social media site, or link to it. However, the SEC would say that while unsolicited, your use of their comment constitutes a testimonial. Moreover, such testimonials are misleading, because when you pull in third-party testimonials, you emphasize the positive comments and ignore the unfavorable ones.

However, according to the SEC, an advisor can pull in such testimonials from non-related third-party sites if the testimonial meets the following criteria:

1. The advisor has no ability to affect which public commentary is included or how the commentary is presented on the independent social media site
2. The independent social media site provides content that is independent of the investment adviser or IAR
3. All comments, both good and bad, can be viewed publicly

These are published in the March 2014 Guidance on the Testimonial Rule and Social Media and are worth looking into if you feel that a third-party site will be good for your business and meets these criteria.

To pull it all together, think of testimonials like this:

<table>
<thead>
<tr>
<th>LinkedIn endorsements</th>
<th>Testimonial: Solicited “Page Likes” or directly linked to investment services or expertise</th>
</tr>
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<tbody>
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<td>Not a Testimonial:</td>
<td>General “Page Likes,” as well as reactions to non-investment posts</td>
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<table>
<thead>
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<th>Facebook “Likes”</th>
<th>Testimonial: Solicited “Page Likes” or directly linked to investment services or expertise</th>
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<tr>
<th>Third-party sites</th>
<th>Testimonial: Linking to an individual’s unsolicited statement of your expertise. This includes someone else’s blog, Facebook Page, etc.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not a Testimonial:</td>
<td>Linking to Yelp, which posts both good and bad reviews, sorted in a non-filtered manner such as by date</td>
</tr>
</tbody>
</table>

**Testimonial Best Practices:**

- Familiarize yourself with the March 2014 Guidance on the Testimonial Rule and Social Media.
- Under the “Skills and Expertise” section on your LinkedIn profile, click “No” on the “I want to be endorsed” feature.
- Don’t use your Facebook interactions to solicit clients’ experiences of working with you.
- Check social media content to ensure that interaction such as “likes” can’t be misconstrued as a testimonial.
- Don’t “like,” share, or retweet third-party testimonials, or lead people to those pages without compliance approval.
- Consider adding a disclaimer informing all readers that all content, likes, and followers of the profile should not be considered as testimonials.

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“Testimonials can be a thorny issue, but with a bit of critical thinking and a willingness to stay away from practice and performance-related content, there’s no reason why this rule should be a barrier for advisors looking to engage online.”
As a financial advisor, you’ve likely built up a number of company compliance procedures that apply to other parts of your business: paid advertising, format of client statements, general disclaimers, electronic communications, etc. Now that you understand what the law has to say about applying the advertising and testimonial rules, you are well-equipped to do so for your social media functions.

However, the SEC stated in its Risk Alert on Social Media that advisors must take care to separate their social media procedures from the rest. In other words, blanket communication procedures won’t cut it here; you have to be specific about which procedures apply to which communication mediums.

After you write a set of procedures, you need to distribute them among your employees and certify that your employees have read and understood the procedures. Like other compliance policies, you must also periodically review their effectiveness and adjust them as needed. Ideally, that’s how you’re running your compliance department already, so rather than get into the nuts and bolts there, it makes more sense to go over some of the key things your Social Media Policies should contain.

### Usage Guidelines

In simple terms, usage guidelines dictate which social media channels you can use. According to the SEC, this might be as sweeping as a list of approved social media sites or a list of specific functions on those sites. Your usage guidelines should take into account the reputation of each site, the site’s privacy policy, the ability to remove third-party posts, and controls on anonymous posting.

### Personal vs. Professional Guidelines

In a lot of ways, this one is an offshoot of the usage guidelines. While a blanket list of social media sites might be part of your usage guidelines, it is important to separate personal accounts from professional ones. Use of enterprise-wide sites such as company pages is a little more cut-and-dry. While some firms may opt for profiles under individual names, these must be treated like company pages: all the usual rules and regulations apply if you’re using them to grow your practice or solicit business. The guidelines for personal vs. professional accounts should be clearly articulated, as well as criteria for individuals who are permitted to use their personal pages for business reasons.

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**Content Standards**

This is the “what to post” part of the equation. Some companies have specific guidelines that control what’s allowed, while others leave more room for discretion. However, in general, it is best to limit the content that can be construed as either an advertisement or a testimonial. This includes content that contains investment recommendations, information on specific investment services, or investment performance. For example, at BPV, we don’t use social media to discuss any of our investment products or performance; rather, we focus on thought leadership and insights.

**Approval of Content**

A good compliance policy should make it clear that a supervisor or compliance officer is to have oversight of each social media channel, so that they can monitor posts and engagement.

The policy should also dictate whether content needs to be approved in advance, or if can be subject to review later on. Whether posts are reviewed after the fact will depend on the kind of information your policies allow you to publish. For instance, if you have an Instagram feed set up to showcase office life, that is less likely a liability than your Twitter feed about market commentary. In other words, the monitoring will need to match the medium.

For posts that don’t require approval in advance, there should also be a system that dictates frequency of review. Decide when social media pages will be checked, whether daily, weekly, biweekly, or at another interval.

“... the content that can be construed as either an advertisement or a testimonial.”
In a lot of ways, recordkeeping is the easiest and most difficult aspect of compliance, once a policy is in place and everyone knows the guidelines of what to publish. It’s cheap yet time consuming for those who don’t have a software solution in place; expensive yet painless for those who do.

The question is, what to record? According to the SEC’s Rule 204-2, advisors must maintain all copies of policies and procedures for five years—this includes that social media policy discussed above. SEC Rules 204-2 and 206(4)-7 also require advisors to implement a compliance archiving and monitoring solution to archive and supervise emails, messages, and social media. Moreover, social media comments must be archived in their original formats, which means showing the content in its actual form, not just the text you used to make the social media post. You must keep records of social media posts for three years.

Luckily, there are a number of resources that help with this very function:

**Smarsh.com**

Smarsh assists over 20,000 firms with their compliance needs in email, instant messaging, text, web, video, and social media communications. They offer various packages that can help you based on your level of need.

**GlobalRelay.com**

This service allows you to locate and record previous messages sent from numerous devices. Global relay is able to search from the platforms it archives which include: Email, Public Instant Messaging, Bloomberg® messages, Thomson Reuters, Social Media, ICE Chat, Pivot 360, Web, Chatter, Yammer, and for Lync/Skype for Business.

**Actiance.com**

Actiance can help ease the stress of recordkeeping by actively enforcing policies across over 70 social platforms and communication channels. Some current clients of Actiance are J.P. Morgan, Fidelity, Bank of America, and Verizon.

**Socialware.com**

Socialware thrives in the social media realm. They can help with any compliance and archiving needs that you might have. Socialware also offers assistance with protecting your social brand.

**HearSaySocial.com**

Hearsay Social walks advisors through the whole compliance process by notifying you in real-time of a problematic post or tweet, as well as pre-approves other content. Hearsay also captures and archives all social activity.

Conclusion

While putting together a comprehensive policy and recordkeeping process that addresses these issues can be difficult, we believe it’s worth it to keep all employees on the same compliance page. Start by tackling the following:

1. Identify the social media platforms you want to use, who is permitted to use them, and whether they can use personal or professional pages

2. Set guidelines for off-limit topics

3. Craft a procedure for compliance pre-approval or post-review

4. Create a recordkeeping plan, using third-party software for efficiency

5. Pull all policies into a singular document and distribute to employees

6. Conduct training and confirmations of handbook receipt, as needed

7. Maintain ongoing oversight and reassess policies as needed

8. Go forth, and be social!