Massachusetts Securities Division Issues Guidance on the Use of Social Media by Investment Advisers

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written by Jennifer Audeh, Robert G. Sawyer

On January 18, 2011 the Massachusetts Securities Division (the "Division") issued guidance on the use of social media by investment advisers registered with The Commonwealth of Massachusetts. The release (the full text of which can be found here) is summarized below, and follows similar guidance issued by the Securities and Exchange Commission's Office of Compliance Inspections and Examinations in an exam alert issued earlier this month (see *Foley Adviser of January 13, 2012 on the exam alert*).

Use of Social Media Generally

The Division clarifies that the use of social media by advisers does not itself violate Massachusetts investment adviser rules or regulations, but cautions that such outlets may pose new risks of which advisers should be cognizant. Social media allows advisers to reach a greater audience very easily and as a result, the Division warns, the risk of potential regulatory violations is magnified because of the larger audience. The Division notes several specific concerns for adviser, as summarized below.

Social Media as Advertising

Although the determination will depend on specific facts and circumstances, the Division states that it generally will consider the use of social media to be advertising and subject to applicable regulatory requirements. This will include any webpage maintained by an adviser on a social media website (such as Facebook or LinkedIn), or any personal

page of an investment adviser representative that contains business-related content or solicitations, to the extent the content is generally accessible to the public.

Recordkeeping

The Division reminds advisers that their recordkeeping obligations under Adviser's Act Rule 204-2 (which includes retention of all advertisements of the adviser) and other applicable Massachusetts regulations will extend to content on social media sites. The Division cautions advisers that the interactive nature of social media webpages and constantly changing content may present challenges to advisers to properly maintaining accurate records as required.[1]

Responsibility for Third-Party Content

In addition to being responsible for content the adviser or its representatives author, an adviser may also be responsible for content prepared by third parties if the adviser is responsible for its creation (entanglement) or if it has approved or endorsed (adoption) the content after it was created. Whether an adviser is responsible for third party authored content will be determined on a case by case basis with reference to the particular facts and circumstances determination, but the Division has offered the following illustrative examples:

1) Linked Information. If an adviser creates a hyperlink to content or "retweets" a link on Twitter, this may imply the adviser approves or endorses the linked content.

2) Selectively Removing Content. If an adviser selectively deletes third-party content that is unfavorable, but continues to display favorable content, the adviser may be deemed to be adopting the remaining content. The Division cautions advisers to develop policies and procedures that provide a schedule for review of content and specific criteria for removal of content.

3) Adviser “Liking” Third Party Content. Without providing specific advice, the Division cautions advisers to be aware that content that is “Liked” may be displayed on its own social media webpage or newsfeed.

4) Solicited Recommendations on LinkedIn. The Division advises that any recommendations posted on an adviser’s LinkedIn profile, especially if they are solicited, are likely considered to be entangled with the adviser. Such recommendations may also be considered testimonials (discussed below).

Testimonials

Content on social media webpages must comply with the requirements under Adviser’s Act Rule 206(4)-1 (which is incorporated into the Massachusetts’ investment adviser regulations), which includes a prohibition on client testimonials. Recent SEC guidance on social media states that, depending on the facts and circumstances, a client “Liking” an investment adviser’s webpage could be considered a forbidden testimonial. The Division agrees with that view, but also states that a Facebook “Like” of an adviser’s social media page will not by itself constitute a testimonial, provided that further actions by the adviser (such as suggesting the number of Likes as indicative of the adviser’s ability) may give rise to a violation. With respect to a client recommendation posted on an adviser’s LinkedIn page, however, the Division adopts a presumption that that such a post will be a prohibited testimonial. The Division advises that investment advisers should consider a policy to restrict the public posting of any client recommendations to a LinkedIn profile.

Performance Advertising

The Division cautions investment advisers to consider whether social media is an appropriate forum for disseminating performance advertising, and particularly discussions of past specific profitable stock recommendations. Rule 206(4)-1 requires full and fair disclosure of all material information relating to advertised performance. The

Division specifically notes Twitter's 140 character limit as a form of communication that may not allow for such complete disclosure.

Compliance and Supervision

The Division suggests that the duty of Massachusetts registered advisers to establish and maintain a system to supervise the activities of its investment adviser representatives and other employees to ensure compliance with state and federal securities laws (as set forth in 950 CMR 12.205), may require adoption of a social media compliance program. With this in mind, the Division offers following suggestions to enhance social media related compliance:

- Conduct periodic reviews of the adviser's social media presence. *The Division notes that the frequency of the review may depend on factors such as traffic on the particular site and the forum, but that a daily review would be considered reasonable supervision.*

- Adopt prohibitions on soliciting or linking to third-party content.

- Incorporate appropriate disclosures on social media webpages to clarify that the adviser is not adopting any third party content. *The Division includes the following example disclosure language in the guidance:* ***"'Likes' should not be considered a positive reflection of the investment advisory services offered by [Investment Adviser]. Visitors to this page must avoid posting positive reviews of their experiences with the adviser or its services as such testimonials are prohibited under the state and federal securities laws and may not reflect the experience of all clients of [Investment Adviser]."***

- Proactively block content that is at odds with regulatory requirements. *The Division specifically notes that advisers should consider disabling functions designed to facilitate endorsements and recommendations.*

In addition to the above, the Division directs advisers to refer to the factors set forth in the SEC's recent release relating to developing a social media compliance program, which the Division notes may be equally applicable to state registered advisers.
[1] The Division does note, without endorsing a particular approach or service provider, that some technology providers may be able to offer advisers assistance in addressing recordkeeping requirements related to social media content.