

Social Media Usage in the Financial Services Industry: Toward a Business-Driven Compliance Approach

Social media use by the financial services industry is prevalent and can be expected to grow as the social networks continue to expand and become further entrenched in the public's online consciousness. However, the industry has lagged behind its corporate peers, likely due to regulatory concerns. In the authors' view, however, regulatory concerns or uncertainty should not lead to paralysis, but instead should be considered in the context of the business purposes behind a financial services firm's intended use of social media. Firms that have a clear business purpose in mind will not only be more effective in their online interactions, but will also have a better understanding of the risks involved. The authors identify four major purposes for which financial services firms might use social media, and explain the issues involved and potential pitfalls to be avoided.

RAJIB CHANDA AND STEVE ZAORSKI

Within the past decade, participation in social media and online communities has become a routine part of peoples' daily lives. To capitalize on this phenomenon, a large percentage of major companies and brands have developed active online presences through an assortment of social media outlets. However, the financial services industry has seemingly lagged behind its corporate peers, largely, we believe, as a result of regulatory concerns. In our view, however, regulatory concerns or uncertainty should not lead to paralysis, but instead should be considered in the context of the business purposes behind a financial services firm's intended use of social media. When considered in that context, the primary issues worthy of consideration will become clearer, enabling a firm to develop tailored policies and procedures that do not inhibit successful social media initiatives.

Rajib Chanda is a partner in the Washington, D.C. office of Ropes & Gray LLP and Steve Zaorski is an associate in the firm's New York office; they are members of the firm's social media practice group. The authors extend their gratitude to Emily Nagle, an associate in the firm's Chicago office, for her contributions to this article. The authors may be reached by email, respectively, at rajib.chanda@ropesgray.com and steven.zaorski@ropesgray.com and Mr. Chanda may be found on Twitter at @rchanda.

OVERVIEW OF REGULATORY LANDSCAPE

In the last two years, the regulatory landscape for the financial services industry has been shaped by the release of guidance from the Securities and Exchange Commission (SEC) and the Financial Industry Regulatory Authority (FINRA).¹ This article does not purport to summarize that guidance, which has been amply summarized elsewhere.² We note that some financial

¹ See SEC, Office of Compliance Inspections and Examinations, "National Examination Risk Alert: Investment Advisor Use of Social Media" (Jan. 4, 2012), available at <http://www.sec.gov/about/offices/ocie/riskalert-socialmedia.pdf> [hereinafter "SEC Risk Alert"]; FINRA, "Social Media Websites and the Use of Personal Devices for Business Communications: Guidance on Social Networking Websites and Business Communications" (Regulatory Notice 11-39, Aug. 2011), available at <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p124186.pdf>; FINRA, "Social Media Web Sites: Guidance on Blogs and Social Networking Web Sites" (Regulatory Notice 10-06, Jan. 2010), available at <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p120779.pdf>.

² See, e.g., Martin Fox, Jack P. Huntington, & Bruce Treff, "Use of Social Media by Investment Advisers," 44(19) Rev. of Sec. & Commodities Reg. 237 (2011), available at http://www.citibank.com/transactionservices/home/securities_svcs/docs/social_media_investment.pdf; Rajib Chanda & Todd Menszak, "Ten Things to Know About Social Media in the Financial Services Industry," 2 Social Media L. Rep. 1 (Jan. 2, 2013).

industry analysts have derided this guidance as “very strict” and have complained that it “make[s] it so difficult that it’s useless,”³ while others have taken a more sober approach to the guidance, recognizing that its laundry list of potential pitfalls is no more extensive than any parade of horrors that could be imagined for activities by highly regulated entities.

There are two fundamental issues with the guidance that has been provided thus far. First, it assumes that the only use for social media is branding or advertising, and largely repurposes advertising rules and regulations into a new context, without

social media for business purposes.⁵ Nonetheless, according to a 2011 SocialWare study of financial advisers in North America, as of September 2011 more than 84 percent of such advisers use social media for business purposes.⁶ This percentage is a marked increase from the 60 percent of advisers who used social media in 2010.⁷ Among the 84 percent who used social media for business purposes, approximately 65 percent stated that they used social media every day, ranging from at least five minutes to one hour of usage.⁸ This rapid acceleration in the adoption of social media by the financial services industry seems to be driven by the confluence of three favorable factors: (1) advancements in consumer and corporate technology (e.g., widespread adoption of smartphones, such as Apple’s iPhone and Google’s Android); (2) consumers’ increased comfort with new technologies and channels (e.g., online and mobile banking); and (3) a somewhat more predictable regulatory environment, largely thanks to the aforementioned SEC and FINRA guidance.⁹ Social media use by the financial services industry has also accelerated as more financial firms discover that social media platforms are a natural complement to their business. Social media has the potential to enhance relationships with customers and develop trust, while financial firms are similarly focused on managing relationships and building trust, as well as prospecting for new clients and talented employees. Underlying this acceleration is, of course, the explosion of social media usage by the adult population generally; a recent report shows that an estimated 91 percent of adults use social media regularly¹⁰ and online social networking now accounts for nearly one in every five minutes spent online globally.¹¹ In the coming years, it is only

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acknowledging that social media can be used for business purposes beyond traditional advertising.⁴ Second, and relatedly, the guidance ignores myriad other issues that firms should consider when adopting social media compliance policies, which we argue could be more relevant for some firms depending on their business purpose for using social media. The biggest question for the financial services industry remains finding a compelling business reason to engage in social media. This article will address the core business purposes for financial firms to use social media and it will analyze the tension between these purposes and the evolving compliance regime. By having specific goals and understanding the compliance rules impacting those goals, financial firms will be better suited to address where the risks lie and how best to navigate them.

EMERGENCE OF SOCIAL MEDIA IN THE FINANCIAL SERVICES INDUSTRY

As a highly regulated industry, the financial services sector has been slower than other corporate sectors to adopt

³ Lisa Shidler, “SEC Sends Sharp Warning to Advisors Using Social Media” (RIABiz, Jan. 6, 2012), available at <http://www.riabiz.com/a/10666007>.

⁴ For an approach that acknowledges such broader uses, see the recent proposed guidance by the Federal Financial Institutions Examination Council, Social Media: Consumer Compliance Risk Management Guidance, Docket No. FFIEC-2012-0001 (January 22, 2013).

⁵ See Michael Veenswyk, “Why Has the Financial Services Sector Been Slow to Adopt Social?” (Econsultancy Blog, Feb. 26, 2013, 11:22 AM), available at <http://econsultancy.com/us/blog/62215-why-has-the-financial-services-sector-been-slow-to-adopt-social>.

⁶ Executive Summary: Social Media Use by Financial Advisors, Social Ware (Sept. 2011) (explaining the increasing use of social media by financial advisors), available at <http://www1.socialware.com/rs/socialware/images/2011%20Financial%20Advisor%20Survey-Executive%20Summary.pdf>.

⁷ Id.

⁸ Id.

⁹ SEC Risk Alert, *supra* note 1; FINRA, Regulatory Notice 11-39, *supra* note 1; FINRA, Regulatory Notice 10-06, *supra* note 1.

¹⁰ IBM Software, Grasping the Power of Social Networking for Financial Services (2012), available at <http://smcapture.com/documents/Power%20of%20Social%20Networking%20for%20Financial%20Services.pdf>.

¹¹ Press Release, It’s a Social World: Social Networking Leads as Top Online Activity Globally, Accounting for 1 in Every 5 Online Minutes (comScore, Dec. 21, 2011), available at http://www.comscore.com/Press_Events/Press_Releases/2011/12/Social_Networking_Leads_as_Top_Online_Activity_Globally.

reasonable to expect that social media will become even more widely adopted by the financial services industry as the younger generation—which grew up following Facebook status updates and tweeting at their favorite celebrities—begins to accumulate capital that needs to be properly allocated.

BARRIERS TO FINANCIAL INSTITUTION ENTRY

Even though social media has been more rapidly adopted in recent years, there are still a number of financial firms that are choosing to sit on the sidelines, and others are only tepidly experimenting with social media, rather than fully embracing this new form of marketing and networking. At least two hurdles stand in the way of industry embrace:

- Firms lack a compelling business purpose to adopt these media, and in any case are unsure about how to properly leverage them; and
- Firms are worried about complying with the raft of existing regulations in the financial services sector.

In regard to the first hurdle, one might surmise that the financial services industry traditionally has a conservative culture that prefers methods with a proven track record rather than venturing into uncharted territory. Further, many financial service professionals do not think potential Twitter followers and Facebook friends would be interested in the type of information that they would want to share. Simply put, many financial firms worry about being too boring for these cutting-edge platforms (or being forced to be too boring once all the rules and regulations are complied with).

As for the second hurdle, close to 91 percent of financial industry professionals claim that “compliance” is the biggest stumbling block to greater social media use.¹² These professionals are troubled by the lack of clear guidance from FINRA and/or the SEC on how to properly use social media, a concern which only becomes more troublesome as the social media platforms continually innovate and alter functionalities. Financial firms are also concerned about the costs associated with compliance, such as hiring lawyers to draft social media policies or licensing new software to retain all social media interactions.

To further complicate matters, there is an inherent tension that exists between these two hurdles.

¹² Diana Britton, “Registered Rep/Wealth Management.com Research: Indies, Insurers Take Lead on Social Media” (wealthmanagement.com, Oct. 19, 2011), available at <http://wealthmanagement.com/practice-management/registered-repwealth-management-com-research-indies-insurers-take-lead-social-med>.

While overcoming the first hurdle would require financial firms to break out of their mold and engage in new forms of social interactions, the second hurdle promises to trip them up by limiting the manner and content of these interactions. To deal with these challenges, we propose a schematic for thinking about the business purposes for using social media for financial services firms, and then identify the main compliance challenges attendant with the specific business purposes. By categorizing a firm’s social media needs according to business purpose, our hope is that firms will be able to identify the key areas of concern from a compliance perspective, rather than getting lost in a host of potential issues.

BUSINESS PURPOSES FOR USING SOCIAL MEDIA

Successful social media strategies and compliance policies should be focused on promoting the underlying

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purpose of the communication. On a macro level, one way of conceiving of social media communications is measuring how well the communications satisfy an “unmet” social need.¹³ For instance, one unmet social need may be fostering relationships among potential or existing clients, such as a group of like-minded parents who are looking for prudent and effective ways to save for their children’s college educations. For many industries, including financial services, this focus on social needs may represent a paradigm shift. Most businesses are used to “helping people meet their economic needs rather than their social needs.”¹⁴ However, a successful social media strategy could help people form and strengthen relationships in ways that benefit the businesses’ bottom-lines.¹⁵ Indeed, social media has even changed the ways that businesses calculate the impact of such marketing on the bottom-line (typically known as the “return on investment” or ROI). Measuring the ROI of social media is not a perfect science, but it is fairly different than traditional ROI calculations. Rather than simply measuring ROI in terms of a direct increase in sales or a jump

¹³ See Mikołaj Jan Piskorski, “Social Strategies That Work,” 89(11) Harv. Bus. Rev. 116 (Nov. 2011).

¹⁴ Id.

¹⁵ See id.

in a firm's client base, ROI in the social media realm can also be measured in terms of driving traffic to the firm's website, increased online chatter regarding the firm's brands or products, an uptick in e-mail registrations, or an increased awareness of a firm's identity, expertise, and role in the marketplace relative to its competitors—to name only a few.¹⁶ Fortunately, numerous software companies have produced analytics programs that can help companies collect a host of information about the social media tactics that work and the strategies that establish the strongest connections between the company and the user both online and offline. Furthermore, the ROI of social media should go beyond the usual metrics since it is more about “helping people, communicating [firm] values and reaching people who care about what [the firm has] to say” according to Vanguard's social media principal, John Buhl.¹⁷ Additionally, most social media platforms are free to join and to use, so these efforts can also help reduce marketing and customer service budgets over the long-term.

To help people create and maintain the social relationships that are at the core of a successful social media strategy, the business must have a specific, chosen purpose (or purposes) for its social media interactions. The biggest social media pitfall any business should avoid is the practice known as “provide and pray.”¹⁸ In the “provide and pray” model, the business provides access to the technology, such as by creating a Facebook page or a Twitter account, and then prays that a community forms or interactions start occurring among the business' followers in such a way that it benefits the business.¹⁹ While communities may form and interactions may occur, they will most likely not be of any value to the company because it is not steering the conversation in a direction that comports with its business goals. A specific, designated purpose is important because it “becomes the cause around which people will rally and be inspired to act.”²⁰ For any

business, including the financial services industry, we believe the specific purpose for adopting social media will most likely fall into one of four categories:

- Branding or advertising;
- To form and mobilize a community or group;
- To take advantage of the live search capabilities facilitated by social media platforms; and
- To provide efficient and cost-effective customer service.²¹

In the following sections, we discuss each purpose, along with the risks and regulations that affect financial services companies as they try to achieve the respective purposes.

BRANDING OR ADVERTISING

Effective Use of Social Media. As any Facebook user would most likely attest, one of the key features that promotes return trips to Facebook's site is the newsfeed. The newsfeed is the centerpiece of the Facebook interface and it is a “constantly updating list of stories from people and Pages”²² (including businesses and organizations) that a user “friends” or “likes” on Facebook. This simple list enables users to catch up on all the information that their friends have pushed out recently and it allows users to comment on or “like” this information. In a similar fashion, LinkedIn also provides a “newsfeed” that enables users to see changes that their “connections” have made to their profiles—new jobs, new degrees, new work experiences, etc. Meanwhile, the Twitter experience almost entirely centers on a constantly updating list of status updates, limited to 140-characters, posted by Twitter users that one chooses to “follow.”

Being listed on a user's newsfeed or Twitter feed is crucial to a business's marketing efforts. The newsfeed enables businesses to push out information directly to the users who follow them, akin to a RSS feed about the company. This functionality essentially enables a business to provide unlimited free advertising for new products, deals, and promotions, and it can also be used to help develop a company's brand. Therefore, being included on a user's newsfeed or Twitter

¹⁶ See Amy McIlwain, “How Can You Gauge the ROI of Social Media Marketing?” (Ignites, Nov. 14, 2011), available at http://www.ignites.com/c/274131/32581?referrer_module=searchResults&module_order=1&q=gauge+the+ROI&sort_by=date.

¹⁷ Maura McDermott, “Use @ Ur Own Risk, SEC Suggests in Social Media Alert” (BoardIQ, Jan. 24, 2012), available at http://www.boardiq.com/c/303332/35412?referrer_module=searchResults&module_order=1&q=use+%40ur+own+risk&sort_by=date.

¹⁸ Anthony J. Bradley & Mark P. McDonald, “Social Media Success Is About Purpose (Not Technology)” (Harv. Bus. Rev. Blog Network, Nov. 1, 2011, 2:57 PM), available at http://blogs.hbr.org/cs/2011/11/social_media_success_is_about.html.

¹⁹ See id.

²⁰ Id.

²¹ This categorization of the four purposes for social media use was developed by Rajib Chanda, one of the co-authors of this article, and Kathie Legg, formerly Senior Mobile and Social Media Manager of Obama for America, in 2011. See Chanda & Menszak, *supra* note 2.

²² “What Is News Feed?” (Facebook), available at <http://www.facebook.com/help/#!/help/210346402339221/> (last visited Dec. 19, 2012).

feed is an invaluable resource for a business, but the challenge for most businesses is gaining access to the newsfeed in the first place.

While a marketing professional may be better suited to provide specific examples of tactics that a financial firm can use to gain followers, there are a few general principles that should guide the process.

Do Not Use Social Media as a Direct Marketing Platform. People who use social media platforms are engaging these networks for a reason, whether it is to keep up with high school classmates, to network with potential employers, or to discover what Kim Kardashian had for breakfast. They are not using social media to be inundated by offers for credit cards or home loans. These are the type of status updates or tweets that usually discourage potential or current followers. In contrast, people tend to follow, share, like, or retweet²³ posts that align with and/or help promote the individual social media user's "brand." People engage social media to share information about themselves with their networks, so the information must strike a chord with that user. Therefore, it is important that financial services companies make themselves useful to the individual, rather than attempting to force feed their information to current or potential followers.

Give Your Followers What They Want, Not What the Company Needs to Push Out for Marketing Purposes. As discussed earlier, one goal of social media could be to satisfy social needs rather than economic ones. This means that companies should not clutter a user's valuable newsfeed space with promotions. Instead, tailor the company's message to what the user needs.

Example: If a community bank exists in a neighborhood with a lot of young families, the bank should consider sharing trade journal articles about saving for college with its followers. This will be more effective than trying to directly sell its 20-year certificates of deposit or high-yield savings accounts to its followers. The sharing of helpful information is an approach that will put the bank on followers' radars, while also allowing the bank to show its "human side" (rather than being seen as solely driven by turning a profit). If a follower enjoys the article and "likes" it or comments on it, then the bank has begun to foster a relationship that might lead

²³ A "retweet" is when a Twitter user chooses to tweet content, with attribution, that has been previously posted by another user.

to more business in the future or even recommendations to friends in the community.

As a recent study has shown, 79 percent of U.S. Twitter users are more likely to recommend brands that they follow and 67 percent are more likely to buy from brands that they follow.²⁴ Furthermore, most people place more trust in the recommendations of their own friends and family because they are familiar with their tastes and proclivities. It can be a powerful endorsement for a company if someone's friend and/or family members choose to "like" a particular brand or write a positive review on Yelp. In the social media age, a company's most powerful advertisement might not be the creative or funny commercial that cost thousands of dollars to create; rather, it is the "word-of-mouth" endorsements that can spread

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quickly and cheaply through individual followers' social networks.

Regulatory Concerns. While the newsfeed is an invaluable resource for financial services companies, there are also important regulations limiting what such companies can say on these platforms when they are used for branding or advertising purposes. Similar to any other communication from a financial firm, all social media communications must conform to the anti-fraud provisions of the securities laws and, potentially, those of the Federal Trade Commission (FTC), including but not limited to ensuring that communications do not contain any untrue statement of material fact or be otherwise misleading.²⁵

Financial firms, specifically broker-dealers, must be careful to not run afoul of the suitability requirement. If a broker-dealer or its personnel recommends a security through a social media platform, then it must ensure that the recommendation is suitable for every investor to whom it is made.²⁶ In a similar

²⁴ IBM Software, *supra* note 10.

²⁵ See, e.g., 15 U.S.C. § 77q(a), 15 U.S.C. § 78j(b), 17 CFR § 240.10b-5, 15 U.S.C. §§ 806-6(2), 806-6(4), and 17 CFR § 275.206(4)-1; see generally, 15 U.S.C. § 45(a).

²⁶ See FINRA Rule 2310; FINRA, Regulatory Notice 10-06, *supra* note 1.

fashion, financial firms pursuing a private offering of securities must ensure that their social media use does not violate the ban on general solicitations (at least as it exists currently pending rules pursuant to the recently-enacted JOBS Act).²⁷

Appropriate Supervision of Employees who “Post.” If a firm chooses to let employees engage in social media for business purposes, the most troublesome risk of using social media updates for branding or advertising purposes is that the financial firm will violate applicable supervisory requirements. Most sophisticated organizations require some approval process before communications on behalf of the company are made, but those approval processes are usually driven by business and marketing concerns, not legal and compliance ones. For financial services firms, it is important to consider whether a legal or compliance overlay in the approval process is necessary. Firms will

social media realm into “static” and “interactive electronic” forums for registered broker-dealers. If the communication is “static”—such as a Facebook or a LinkedIn profile—then it is considered an “advertisement” and requires principal approval prior to use.³⁰ If the posted content is non-static, real-time communications—such as a Facebook wall post³¹ or a responsive tweet—then the information does not need prior principal approval but it should be supervised by the firm.³² This supervision may take various forms, such as post-use sampling or lexicon-based search methodologies.³³

It is important to note that interactive content can become static content if the interactive content is copied or re-posted to a static forum such as a blog or Facebook profile and thus, the rule above for static content will apply. Fortunately for the financial services industry, with respect to interactive content, FINRA has “backed away from a proposal that would have required broker-dealers to file social media postings with the regulator,” although in certain circumstances, mutual fund firms may need to file static or interactive content as a result of SEC rules.³⁴ Nonetheless, financial services companies have dealt with this tricky dichotomy in different ways. For example:

- Morgan Stanley has reportedly launched a pilot program that takes the approach of allowing employees to use only a pre-approved library of tweets.³⁵
- Raymond James reportedly allows its employees to generate original messages (in addition to choosing from a library), but these original messages are screened—typically on the same day, before posting—even though the firm has taken the

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also need to think about whether employees who engage in the use of social media for business purposes should make their passwords available to their employer, so that compliance professionals can swiftly take down offending posts or otherwise control the account if the employee leaves the firm.²⁸ However, collecting such password information may not be permitted depending on the particular state in which an employee works.²⁹

With respect to pre-approval of communication, in Regulatory Notice 10-06, FINRA divides the

²⁷ 17 CFR § 230.501-.508 (2012); 17 CFR 230.502(c) (2012). Jumpstart Our Business Startups (JOBS) Act, P.L. 112-106, 126 Stat. 305 (2012).

²⁸ Firms should also consider making it clear that they own the accounts under which business is being conducted, perhaps in an employee manual. See Complaint, *Phonedog v. Kravitz*, No. C 11-043474 MEJ (N.D. Cal. Nov. 8, 2011); John Biggs, “A Dispute Over Who Owns a Twitter Account Goes to Court,” N.Y. Times, Dec. 26, 2011, at B1.

²⁹ Currently, Maryland, Delaware, Michigan, California, Illinois, and New Jersey have such restrictions. See David Kravets, “6 States Bar Employers From Demanding Employee Passwords,” (Wired, Jan. 2, 2013), available at <http://www.wired.com/threatlevel/2013/01/password-protected-states/>.

³⁰ FINRA, Regulatory Notice 10-06, supra note 1.

³¹ The Facebook wall is a section of a user’s profile where other users can post comments, pictures, and video. The user has control over which other users can view the wall.

³² FINRA, Regulatory Notice 10-06, supra note 1.

³³ Id.

³⁴ See Dan Jamieson, “Tweet Away: FINRA Backs Off Social-Media Posting Regs” (InvestmentNews, Dec. 30, 2011, 1:47 PM), available at <http://www.investmentnews.com/apps/pbcs.dll/article?AID=/20111230/FREE/111239990>; SEC Division of Investment Management, Guidance Update: Filing Requirements for Certain Electronic Communications (March 2013), available at <http://www.sec.gov/divisions/investment/guidance/im-guidance-update-filing-requirements-for-certain-electronic-communications.pdf>.

³⁵ Josh Brown, “Raymond James Gets Social Media Right” (Wall St. J. Wealth Management Blog, Nov. 10, 2011, 7:48 AM), available at <http://blogs.wsj.com/financial-adviser/2011/11/10/raymond-james-gets-social-media-right/>.

position that such review is not necessary under the regulations.³⁶

The SEC also addressed monitoring requirements for investment advisers, but the SEC's position largely leaves the frequency of such monitoring up to each firm.³⁷ The SEC simply requires investment advisers to monitor social media interactions and it encourages firms to consider the following factors in making their determination regarding the frequency of such monitoring:

- The volume and pace of such social media communications; and
- The probability of misleading communications being found within certain conversation streams.³⁸

The SEC also leaves any pre-approval of social media communications to the discretion of each financial firm, unless the firm is also a member of FINRA and thus is required to comply with FINRA's more stringent guidelines.

Recordkeeping Concerns. Regardless of the business purpose underlying the use of social media, it is absolutely vital that a financial services company remains mindful of its recordkeeping responsibilities. Every financial services firm that intends to communicate through social media platforms must ensure that it can retain records of those communications as required by Rule 204-2 of the Advisers Act, Rules 17a-3 and 17a-4 under the Securities Exchange Act of 1934 (the "Exchange Act"), and FINRA Rule 3110, as applicable.³⁹ Beyond the rules, however, recordkeeping

is a paramount compliance concern because of the increased regulatory or enforcement risk that can result from poor recordkeeping. Because records are the only way to demonstrate compliance with any applicable requirements, poor recordkeeping is low-hanging fruit for regulators—easy to identify and a basic requirement of being a regulated entity.

Of course, recordkeeping may be easier said than done, although it is relatively straightforward if a firm is using social media solely for branding and advertising. For that type of use, most communications that are required records are created by the firm or its employees, as opposed to third parties, and so long as you have the ability to capture the feeds, a large part of the recordkeeping responsibility will be satisfied. Some firms use third-party or proprietary

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software to do so, while others use more manual processes such as screen shots on a periodic basis or diverting posts into an RSS feed that is captured on a firm's network. We will revisit recordkeeping later in our discussion of more interactive uses of social media, and the challenges that those uses might pose in this regard.

Bottom Line. Since most financial services firms are using social media for branding and advertising purposes, we believe that a compliance regime that focuses on anti-fraud training, suitability, supervision, and recordkeeping, while being mindful of particular state restrictions on matters such as collection of passwords, is the key to a successful compliance program for those firms. That is not to say that other issues raised by the SEC and FINRA in their respective guidance are not important, but that those issues can be considered ancillary to the key areas of risk that are raised by this type of social media usage.

FORMING AND MOBILIZING SOCIAL COMMUNITIES

Effective Use of Social Media. The ability to use social media to create formal and informal online groups or communities is arguably one of the

³⁶ See Tom Groenfeldt, "Raymond James Financial Advisors Get Social" (Forbes, Dec. 26, 2011, 3:55 PM), available at <http://www.forbes.com/sites/tomgroenfeldt/2011/12/26/raymond-james-financial-advisors-get-social/>; Bruce Kelly, "At Raymond James, It's a Valuable Tool for Communication" (InvestmentNews (June 17, 2012, 5:43 PM), available at <http://www.investmentnews.com/article/20120617/REG/306179980>.

³⁷ See SEC Risk Alert, supra note 1.

³⁸ Id.

³⁹ See FINRA, Regulatory Notice 10-06, supra note 1. FINRA rules require a firm to retain records of communications that relate to its "business as such" and this determination depends upon the facts and circumstances. For broker-dealers, Exchange Act Rule 17a-4(b) requires that firms preserve such records for a period of not less than three years and for the first two years the records must be kept in an easily accessible place. Meanwhile, registered investment advisers must retain such records in compliance with the federal securities laws, including in a manner that is easily accessible for a period of not less than five years under Advisers Act Rule 204-2. The type of device used to access the social media platform and whether the communication is static or interactive does not matter for record-retention purposes. The SEC Alert reminds companies in the financial industry that they need to train their employees on what constitutes a business communication and that they need to periodically monitor employees' compliance with this record retention responsibility. See SEC Risk Alert, supra note 1.

most revolutionary aspects of the platforms. On Facebook, there are pages that “allow organizations, businesses, celebrities and brands to communicate broadly with people who ‘like’ them,” while groups provide a “closed space for small groups of people to communicate about shared interests.”⁴⁰ The group functionality on LinkedIn is very similar to Facebook’s model; however, it tends to revolve around the user’s industry or educational connections. For example, LinkedIn has a social media law group through which lawyers and financial professionals are able to share articles and discuss recent developments. Twitter groups are more informal; they are formed by users who generate tweets and include a similar hashtag.⁴¹ Perhaps the most dramatic display of the power of Twitter groups occurred during the “Arab Spring” as protesters across the Middle East used short tweets with an attached hashtag that were easily searchable by fellow protesters who wanted to join in or follow the growing movement.⁴² Closer to home, the 2012 presidential election also inspired a number of social media groups that the candidates used to organize supporters, spread their policy agendas, share daily campaign videos, and even to fundraise.⁴³

These types of communities existed online previously, in places like chat rooms and message boards. But the power of social media is that from one platform, a user can be a member of multiple communities at once, without having to go to multiple sites. Thus, social media groups or communities have enabled mass collaboration on a scale that has never before existed. With the click of a mouse, a person can be connected to multiple networks of like-minded individuals with whom that person can share ideas and get feedback in real time. Additionally, these communities of friends, or merely like-minded people, can become trusted sources for news, reviews, and recommendations for products.

⁴⁰ “How are Pages different from groups?” (Facebook), available at <http://www.facebook.com/help/210346402339221/#/help/155275634539412/> (last visited Dec. 20, 2012).

⁴¹ A hashtag is usually a word or phrase following the number symbol. For instance, every year football fans across America comment on the Super Bowl and most likely use the hashtag, #superbowl, so other football fans can view their comments on the game in real time.

⁴² Uri Friedman, “The Egyptian Revolution Dominated Twitter This Year” (Foreign Pol’y Passport Blog, Dec. 5, 2011, 4:51 PM), available at http://blog.foreignpolicy.com/posts/2011/12/05/the_egyptian_revolution_dominated_twitter_this_year.

⁴³ See Sophie Quinton, “Social Engagement: What Happens When You ‘Like’ Barack or Mitt?” (Nat’l J., Apr. 22, 2012, 8:00 AM), available at <http://www.nationaljournal.com/2012-presidential-campaign/social-engagement-what-happens-when-you-like-barack-or-mitt-20120422>.

A financial services company that is already leveraging social media groups for its advantage is American Express (AMEX). For the past three holiday seasons, AMEX has successfully used a Facebook group to promote “Small Business Saturday,” which occurs the Saturday after Thanksgiving. This Facebook group, which is the core of the marketing efforts for this initiative, encourages followers to use their AMEX cards at a list of participating local small businesses. In exchange for patronizing these businesses, the individual is given a \$25 credit on his or her credit card statement.⁴⁴ In 2011, more than 2.6 million consumers participated in the group on Facebook, which represented an increase in participation of over 73 percent.⁴⁵ In 2012, consumers spent \$5.5 billion on Small Business Saturday, which surpassed the pre-holiday estimate of \$5.3 billion.⁴⁶ Furthermore, small business owners could participate by joining the “American Express OPEN” group and gaining access to a small business toolkit.⁴⁷ AMEX’s program is a helpful example because it demonstrates that satisfying consumers’ social needs, such as mobilizing followers to shop locally for friends and family with the added incentive of a discount, can lead to the satisfaction of the business’s needs, namely more people using their credit cards while making in-roads into the small business community. Other examples of successful community-building activities include Ameriprise, which has launched an investment adviser search tool through LinkedIn, and both E*TRADE and optionsXpress, which have launched their own social communities for investors to share tips and strategies.⁴⁸

Many professionals worry about the potential for negative conversation streams about their firms. It is important to accept that negative chatter on the internet about a firm is always going to exist, whether or not that firm has an online presence. Having an active online presence through social media, however,

⁴⁴ Christina DesMarais, “Social Media, American Express Helping Holiday Shoppers Get Good Deals” (PCWorld, Nov. 26, 2011, 7:49 AM), available at http://www.pcworld.com/article/244951/social_media_american_express_helping_holiday_shoppers_get_good_deals.html.

⁴⁵ Id.

⁴⁶ Cheryl Winokur Munk, “Shoppers Spend \$5.5 Billion on Small Business Saturday” (CNBC, Nov. 28, 2012, 9:47 AM), available at http://www.cnbc.com/id/49993064/Shoppers_Spend_55_Billion_on_Small_Business_Saturday.

⁴⁷ See Page for American Express OPEN, Facebook, <https://www.facebook.com/Open> (last visited Dec. 20, 2012).

⁴⁸ See Paul Taylor, “Financial Services Firms Embrace Social Media” (Fin. Times, Apr. 13, 2012, 10:59 PM), available at <http://www.ft.com/intl/cms/s/0/5218321c-85a7-11e1-90cd-00144-feab49a.html>.

allows the firm to become a part of the conversation stream, giving it an opportunity to minimize any negativity, clarify the situation, and respond directly to any concerns.

Regulatory Concerns. Social media groups and communities can be powerful tools for mobilizing large groups of people, but they also raise particular risks under the securities laws for the financial services industry. One such risk relates to third-party posts on a financial firm's social media profile or group page. If the firm is a registered broker-dealer, FINRA's position is that posts by third parties are not considered communications by the firm and therefore do not trigger the prior principal approval, content, and filing requirements.⁴⁹ However, a third-party post may become attributable to a registered broker-dealer if the firm has (1) "involved itself in the preparation of the third-party's content" (known as "entanglement") or (2) "explicitly or implicitly endorsed or approved the content" (known as "adoption").⁵⁰ For instance, a registered broker-dealer should not pay a third party to write on its Facebook wall or retweet a message from a third party whose content may run afoul of other FINRA requirements, such as suitability. According to FINRA, it is a best practice among the broker-dealer industry to establish appropriate usage and screening guidelines for third parties that are allowed to post on the dealer's social media platforms.⁵¹ Registered broker-dealers also need to ensure that any links shared via their social media platforms do not connect to websites that the broker-dealer knows or has a reason to know contains false or misleading information.⁵² In the SEC Alert, the agency did not take a clear position on third-party posts; instead, they left it to the discretion of the firm to determine what types of posts are permissible.⁵³

Potential Liability for Third-Party Statements. The shortcomings of the FINRA and SEC guidance are revealed when one considers using social media for purposes beyond branding and advertising. If a firm actively wants to create a community and have engaged discussion, it must participate in that discussion, or in some other way promote it (by the creation of a hashtag for instance). If a firm creates a hashtag, does every post following that creation become a post

"adopted" by or "entangled" with the firm? It is unclear from existing guidance, but we believe the better view is that they do not. This is because users of social media innately understand that they can take content that is available and repurpose it for their own ends, and the typical social media user would not mistake a comment by a third party as a statement by the firm itself. However, firms still must be careful not to retweet or "like" particular posts if they are not comfortable having liability for those statements, and thus we believe that firms that use social media to create and mobilize communities need to spend considerable time generating guidelines for when retweets and likes are permissible, and perhaps even require some pre- or post-approval for such actions.

Firms should also be aware that they may delete lewd, defamatory, or otherwise inappropriate third-party posts pursuant to Section 230 of the

It is important to accept that negative chatter on the internet about a firm is always going to exist, whether or not that firm has an online presence. Having an active online presence allows the firm to become a part of the conversation stream, giving it an opportunity to minimize any negativity, clarify the situation, and respond directly to any concerns.

Communications Decency Act, and should be prepared to monitor and delete such posts if they are using social media as a way to form or mobilize a community.⁵⁴ This 1996 statute "immunizes social media and other websites from liability for content published by their users, provided that the site owners are 'not responsible in whole or in part, for the creation or development of' the offending content."⁵⁵ However, a firm should not view this statute as giving it a right to delete all posts that are negative. Indeed, deleting all negative posts could become a problem under the guidance issued by the FTC, which may be applicable to certain activities by financial services firms. The FTC's mandate is to protect consumers from "deceptive and unfair acts or practices" and only removing negative posts from a firm's social media streams may be construed as such an act since it could potentially mislead

⁴⁹ See FINRA, Regulatory Notice 10-06, supra note 1.

⁵⁰ Id.

⁵¹ See id.

⁵² See FINRA, Regulatory Notice 11-39, supra note 1.

⁵³ See SEC Risk Alert, supra note 1.

⁵⁴ 47 U.S.C. § 230.

⁵⁵ See Cecilia Ziniti, "A Dirty Job: The Dirty.com Cases Show the Limits of CDA Section 230" (Socially Aware Blog, Apr. 26, 2012), available at <http://www.sociallyawareblog.com/2012/04/26/a-dirty-job-the-dirty-com-cases-show-the-limits-of-cda-section-230/>.

consumers.⁵⁶ In addition, firms that use social media to form or mobilize groups or communities may be tempted to have employees post favorably about the company on those pages. This temptation must be avoided: The FTC has brought charges for deceptive advertising against companies that posted such reviews without disclosing that the posters were either being paid to do so or were employees of the company.⁵⁷

Prohibited Testimonials. Another even more troublesome concern for the financial services industry when using social media to form or mobilize groups arises from the prohibition of testimonials, such as recommendations or endorsements on LinkedIn or even “likes” on Facebook, for investment advisers. Under Rule 206(4)-(1)(a)(1) of the Advisers Act, a recommendation or endorsement appearing on a user’s social media profile could be seen in certain situations as a prohibited testimonial regarding an adviser’s services or advice. In the SEC Alert, the agency has taken an even more hard-line stance, warning that if the “public is invited to ‘like’ an [advisor’s] biography posted on a social media site, that election could be viewed as a type of testimonial prohibited by rule 206(4)-(1)(a)(1).”⁵⁸ While some financial firms may read these regulations and decide that it is best to avoid social media altogether, we believe that approach is shortsighted and fails to account for the ways to ameliorate the risks of incurring a prohibited testimonial.

Example: A financial firm on LinkedIn may not be able to disable the recommendation or endorsement features, but the firm can “hide” the features so that they do not appear on the firm’s profile. The recommendation or endorsement will still appear on the recommender’s profile page, but the firm will arguably avoid liability, provided that it did not request the recommendation or endorsement (i.e., avoiding entanglement and adoption, by analogy to FINRA guidance, as previously discussed), since the firm itself is not advertising the testimonial.⁵⁹

⁵⁶ See Bureau of Consumer Protection, Advertising and Marketing on the Internet: Rules of the Road (200), available at <http://business.ftc.gov/documents/bus28-advertising-and-marketing-internet-rules-road>.

⁵⁷ See Miguel Helft, “Charges Settled Over Fake Reviews on iTunes,” N.Y. Times, Aug. 27, 2010, at B1.

⁵⁸ SEC Risk Alert, *supra* note 1.

⁵⁹ If employees seek to post professional biographies, an employer would also be able to direct its employees to disable, hide, or reject any recommendations or endorsements of the employee as a financial services professional. In imposing limits on employees’

As for Facebook, some industry attorneys are making the draconian argument that financial services companies might want to consider not using the platform since a user must click the “like” button in order to follow a company on the site and add it to the user’s newsfeed.⁶⁰ However, it is difficult to believe that the SEC intended to outright ban Facebook for the financial services industry since the SEC Alert did not clearly posit such a ban. A more measured view would be to take the position that the firm cannot actively solicit users to “like” posts regarding an adviser’s products or services. Further, as most Facebook users know, clicking the “like” button to follow a company’s page is not necessarily an endorsement of its products or services. Unlike on LinkedIn, where a recommendation serves as exactly that, the “like” button on Facebook is simply the functionality for connecting users on the platform; clicking it should not necessarily be seen as an endorsement of anything. In our experience, financial firms usually monitor their Facebook walls (often as frequently as daily) to ensure that any third-party testimonials are removed.

Recordkeeping. As discussed above, recordkeeping is a key consideration for all types of social media use by financial services firms. While FINRA, for example, generally does not treat third-party posts as associated with the firm unless the firm adopts the post or becomes entangled with it, the recordkeeping rules still require retention of these third-party posts if they relate to the firm’s “business as such.”⁶¹ Even if the firm is going to delete the post from its social media profile, the retention requirements may still apply if this “business as such” standard is satisfied.

Firms will thus want to have a clear policy on which, if any, third-party posts will be maintained as records of the firm. We have seen several approaches in the industry, including:

- Preserving all communications (including deleted posts), similar to the way in which many firms retain all email;
- Preserving only those posts that are retweeted or liked by the firm or an employee, or posts that generated a direct response by the firm or employee; and

private social media activities, however, firms should be aware of federal and state laws that restrict an employer’s ability to do so. See, e.g., Office of the Gen. Counsel, Div. of Operations Mgmt., Memorandum OM 12-59 (2012), available at <http://www.theemployerhandbook.com/NLRBThirdReport.pdf>.

⁶⁰ McDermott, *supra* note 17.

⁶¹ FINRA, Regulatory Notice 11-39, *supra* note 1.

- Not preserving any third-party posts on the theory that those posts are not generated by the firm and not in the category of communications received that are required to be kept.

We think all three options are supportable; a key feature of any policy, however, must be consistency in approach. We also believe that different social media sites could lead to different outcomes on this question. On Facebook, it is fairly easy to capture all comments on a post, since it is on the firm's page (although a user could choose to delete his own post); on Twitter, that is harder to do, and we do not think the regulatory requirements mandate searches for all hashtags and @-tags directed to a firm (but firms might choose to keep direct messages sent to them).

Bottom Line. If a financial services firm's primary business purpose for using social media is to form or mobilize communities, then, we would argue that a social media policy that hews closely to the FINRA and SEC guidance would be leaving out key elements. While the FINRA and SEC guidance do touch upon certain key considerations—such as the prohibition on testimonials, the responsibility for certain third-party posts, and recordkeeping—a thoughtful policy and training program would go beyond the guidance on third-party posts to actively consider how its moderators will interact with other users. The policy would also address, most notably, the Communications Decency Act and possibly FTC limitations on deleting unfavorable posts and employee postings.

LIVE SEARCH CAPABILITY

Effective Use of Social Media. One of the key advantages social media has against “Web 1.0” is the ability to learn about events in real-time. While search engines are incredibly fast and accurate at providing links to pages on the World Wide Web regarding particular topics, they are less adept at being able to provide search results on events occurring live. In broad strokes, for a search engine to find a page, it must first catalogue a page for it to be retrieved. While that happens very quickly, it cannot match the speed of social media users who can report on events as they occur. Twitter is a particularly good platform for live search since it converts millions of users into eyewitness reporters, as users who followed during the Arab Spring revolutions or Hurricane Sandy can attest. By searching the proper topic or the appropriate hashtag, a Twitter user can follow live events as they unfold.

While the usefulness of live search may be obvious for those unable to watch sporting events live, or those trying to get information on power outages as they spread in the wake of a hurricane, the usefulness for financial services firms may be less obvious. But many financial firms have used the live search feature for business purposes. One of the most common ways firms have used social media in this way is by enhancing the interactivity of a company's quarterly earnings report. Many firms, for example, live tweet their earnings report, and industry analysts interpret and comment on the report in real time using the same hashtag.⁶² While the company and industry analysts are tweeting, anyone else in the general public can perform a search of that hashtag or topic and follow along in real time and make his or her own assessment of the report, including potentially adding his or her own comment to the conversation.

One of the most common ways firms have used live search capability is to enhance the interactivity of a company's quarterly earnings report—for example, live tweeting their earnings report, and having industry analysts interpret and comment on the report in real time using the same hashtag.

Mutual fund firms, such as Vanguard,⁶³ live tweet webcasts with key investment professionals, which is a way of turning the provision of market insights into events that enhance brand recognition and loyalty. While firms generally limit the number of communications via social media lest their feed be seen as “spam” by followers, providing updates on real-time events anecdotally is less likely to be seen as spam by followers, especially if it is done relatively infrequently. But the temporary spike in the number of communications increases, axiomatically, the chances of a firm's content being seen on a user's newsfeed, and that may be a valuable way to reach followers who follow a large number of other users (incidentally, those followers may be the most valuable followers upon whom to make an impression, since they have the largest network to which they can retweet or otherwise promote awareness of a firm's brand).

⁶² See Dominic Jones, “Live Tweeting Becomes a Fixture of Earnings Season” (IR Web Report, Aug. 16, 2011), available at <http://irwebreport.com/20110816/live-tweeting-quarterly-earnings/>.

⁶³ See @Vanguard_Group, Tweet (Twitter, Feb. 21, 2013, 11:02 AM), available at https://twitter.com/Vanguard_Group.

Similar to the other specific, designated purposes for social media adoption by the financial services industry, this purpose needs to be leveraged appropriately for the firm to take full advantage of its benefits. Even as social media has lessened information asymmetry and may thereby reduce a client's reliance on a financial firm as its sole source for investment advice, a financial firm still has an important role to play on this newly leveled landscape. Thus, taking advantage of live search is important even for those firms that do not choose to broadcast firm events live over social media. By that, we mean that firms should be aware that a significant portion of real-time communication regarding matters of interest to firms' clients is happening in connection with live events. Firms should be aware of hashtags and trending topics⁶⁴ in their field to ensure that their addition to the conversation can be easily seen, among other comments, if firm clients opt to perform a live search for that topic.

communications. As discussed earlier, FINRA and the SEC have offered guidance on supervision of employees as well. Given the inherent fast-paced nature of live search, we believe the primary method of supervision must be through extensive training of the individuals who will be communicating on the firm's behalf.

Regulation FD. Another key area of concern when utilizing social media for live search arises from Regulation FD, which prohibits public companies from making selective disclosure of material, non-public information to select individuals before such information is made available to the general public.⁶⁶ Recently, the SEC offered guidance on how firms can manage their responsibility under Regulation FD in the social media age.⁶⁷ The guidance stemmed largely from the investigation of Netflix and its CEO, Reed Hastings, who found himself in hot water over a Facebook post that proclaimed Netflix subscribers had watched one billion hours of video during a single month.⁶⁸ While Mr. Hastings' post existed in the public domain, including being directly posted to his over 200,000 followers, the SEC still pursued an investigation of Mr. Hastings and Netflix for allegedly violating the selective disclosure rule.⁶⁹ The SEC ultimately decided not to pursue an enforcement action and instead established that sharing information in a social media post can in certain circumstances be akin to publishing it on a corporate website, as long as investors are alerted in advance that such information will be shared using particular social media outlets.⁷⁰ In light of this recent guidance, firms should consider including a statement in their press releases and other public reports that specifically refers to the company's social media accounts as a source for important information about the firm. It is also critical for any firm that allows its employees to use social media on a real-time basis to have a clear policy regarding the disclosure

It is important that financial firms do not allow the limitations of a social media platform—such as the 140 character limit on Twitter—to result in misleading statements.

Regulatory Concerns. The risks that arise in this area, particularly with live events such as tweeting earnings calls or webcasts, should be familiar to most financial industry professionals. First and foremost, financial firms must continue to observe their responsibility to avoid untrue statements of material fact and avoid omissions of material facts that might result in misleading statements.⁶⁵ While this might seem an easy duty to uphold, the casual and rapid nature of communication on social media may cause some professionals to take a less vigilant approach to the nature of their communication. Furthermore, it is important that financial firms do not allow the limitations of a social media platform—such as the 140-character limit on Twitter—to result in misleading statements. Similar concerns arise when considering the suitability requirements under FINRA rules. Thus, if a firm chooses to utilize social media as a means of enabling live search regarding the firm, or to enable employees to comment on live events in real time, the significant focus in a firm's compliance program should be on topics relating to the types of permissible

⁶⁶ 17 CFR pt. 243 (2012). Mutual fund firms should also be aware of rules regarding disclosure of portfolio holdings. See *Disclosure Regarding Market Timing and Selective Disclosure of Portfolio Holdings*, SEC Release No. 33-8408 (May 28, 2004), available at <http://www.sec.gov/rules/final/33-8408.htm#text>.

⁶⁷ SEC Release No. 69279, *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: Netflix, Inc., and Reed Hastings*, April 2, 2013.

⁶⁸ See Michael J. De La Merced, "S.E.C. Sets Rules for Disclosures Using Social Media" (N.Y. Times DealBook, Apr. 3, 2013, 9:53 PM), available at <http://dealbook.nytimes.com/2013/04/02/sec-clears-social-media-for-corporate-announcements/>.

⁶⁹ Id.

⁷⁰ SEC Release No. 69279, *supra* note 67.

⁶⁴ On Twitter, if a particular topic, hashtag, or user is being tweeted about by a large number of users at the same time, then it is said to be "trending."

⁶⁵ See, e.g., 17 CFR § 240.10b-5 (2012).

of non-public information; ordinarily, an individual employee account (as opposed to an account in the name of the company) would likely not be the avenue for such communications under the SEC's guidance on this topic. Firms should also be aware that the New York Stock Exchange may have different requirements for the dissemination of certain types of information, so a release of information on social media that complies with the SEC guidance may require simultaneous notification of wire services and/or the filing of a Form 8-K.

Securities Offerings. Another area of concern relates to the regulations related to securities offerings, whether private placements or public offerings. Firms should carefully craft policies so that the parameters of the Regulation D exemption under the Securities Act of 1933 for private placements or the "gun-jumping" rules for public offerings, whichever are applicable to the situation, are not triggered.⁷¹ Similarly, when there is an ongoing proxy solicitation in effect for a firm or one of its funds, the firm should be careful not to trigger any violations of Regulation 14A under the Exchange Act (which generally requires that solicitations not be made unless each person solicited concurrently is furnished or has previously been furnished with the relevant proxy statement).⁷²

Bottom Line. Thus, when a financial services firm seeks to utilize the live search functionality of social media, rather than focusing on the existing guidance, firms should concentrate their efforts on training key individuals regarding the types of permissible statements under relevant anti-fraud rules. In addition, policies should cover areas that are not addressed at all in the existing guidance, including the private placement/gun-jumping rules and proxy solicitation rules. Of course, as noted above, certain issues remain, such as recordkeeping, but the key areas of compliance concern differ based on the business purpose underlying the use of social media.

EFFICIENT AND COST-EFFECTIVE CUSTOMER SERVICE

Effective Use of Social Media. In the past few years, social media platforms have been increasingly utilized as valuable customer service tools. In some instances, such as the outrage not too long ago over the big banks' proposed ATM fees, social media has been

used spontaneously and without any encouragement by the financial services companies. This firestorm clearly caught the attention of the banks' customer service departments as all of the banks were ultimately forced to back down from their proposed fees.⁷³ In contrast, many financial firms have proactively adopted Facebook profiles or Twitter user names that are to be used specifically by customers for complaints and questions. Today, since most people have access to the internet via either their computers or their mobile devices, the speed and directness of using social media to resolve a customer service issue is appealing. Indeed, for many, firing off a wall post or a tweet is much better than waiting on hold for the next available customer service representative.

Critics of this new approach to customer service argue that it does not save the customer any time because, due to the confidential nature of most financial issues, the issue is ultimately re-directed to a traditional form of customer service, such as a call center or the customer's local branch. While this may be true for many financial firms today, others have already developed innovative systems to overcome this shortcoming. For instance, Citigroup hired a software maker, LivePerson Inc., to design a program that allows customers to click on a link in the Facebook or Twitter conversation that immediately switches the conversation to a live online chat or telephone call with the same customer service agent who was addressing the customer's concerns via social media.⁷⁴

While some financial firms may not like the idea of having customers' complaints and/or questions aired publicly for all to see, this method may actually work in their favor. As an initial matter, since the question or complaint is viewable by the public, there is a chance that other users with a similar problem may take it upon themselves to respond to the issue, if they know the answer. Furthermore, if the resolution of the issue has greater applicability (e.g., the website is down), it also allows other users to benefit from the public conversation without overloading phone centers. In addition, the firm's wall or Twitter feed may serve as an informal Frequently Asked Questions (FAQs) bulletin board, which customers can scroll through to find the answer to their questions on issues that have been previously resolved for other customers.

Financial services companies should also recognize that this public airing of grievances enables the company to publicly turn negative publicity into a

⁷¹ 17 CFR § 230.501-.508 (2012); 15 U.S.C. § 77e (2006).

⁷² 17 CFR § 240.14a-1-.14b-2.

⁷³ See Tara Siegel Bernard, "Bank of America Drops Plan for Debit Card Fee," N.Y. Times, Nov. 2, 2011, at A1.

⁷⁴ See Suzanne Kapner, "Citi Won't Sleep on Customer Tweets," Wall St. J., Oct. 5, 2012, at C1.

positive. By providing a timely and accurate response to customer complaints via social media, a firm can publicly show that it listens to its customers and will provide needed assistance. These social media customer service outlets provide another important “touch point” between the firm and its customers and according to a financial industry insider “customer satisfaction is almost directly correlated with the number of touch points.”⁷⁵

Regulatory Concerns. In providing first-class customer service, there are important regulatory concerns that financial firms need to consider, many of which are not addressed in the existing guidance.

Privacy Issues. First, firms should remain aware of their obligations under various data privacy laws. Customers will sometimes provide, even though one might not expect it, personal identifying information (PII) via social media channels. Firms should take care not to request such personal information, and should have policies to direct conversations on to private (preferably proprietary) systems to continue conversations where PII is required to solve the problem.

If PII or other non-public personal information is transmitted to a financial services firm, then the firm must remain cognizant of its responsibilities under the Gramm-Leach-Bliley (GLB) Act,⁷⁶ which requires a financial institution to have systems in place for protecting any confidential information that it receives from customers.⁷⁷ Additionally, if the institution chooses to collect such information using social media, then certain privacy disclosure obligations are triggered, including the delivery of a privacy notice and notification of the right to opt out of any disclosure of a customer’s information to third parties.⁷⁸ Since such disclosure obligations may be difficult to meet in the social media context, firms will likely want to avoid the collection of such information. Another reason to avoid collecting such information is because data breaches or other unauthorized uses of PII may result in a number of inconvenient and potentially embarrassing consequences, such as having

⁷⁵ Kristen French, “Momentum Building for Social Media Adoption in Financial Services” (Wealth Management, Oct. 27, 2011), available at <http://wealthmanagement.com/resources-amp-community/momentum-building-social-media-adoption-financial-services>.

⁷⁶ See Bureau of Consumer Protection, In Brief: The Financial Privacy Requirements of the Gramm-Leach-Bliley Act (2002), available at <http://business.ftc.gov/documents/bus53-brief-financial-privacy-requirements-gramm-leach-bliley-act>.

⁷⁷ See id.

⁷⁸ See id.

to cooperate with law enforcement as they pursue an investigation and having to notify customers affected by such incident.⁷⁹

Customer Complaints. Second, registered broker-dealers need to be mindful of FINRA Rule 4530(a) (1)(B), which requires a member firm to report within 30 calendar days after the firm knows or should have known that an associated person is the subject of any written customer complaint alleging theft, misappropriation of funds or securities, or forgery.⁸⁰ Member firms also must report quarterly statistical and summary information regarding such written customer complaints.⁸¹ In addition, registered investment advisers need to follow their internal policies and procedures for handling customer complaints.⁸²

Facebook posts and tweets are in a written format, so a broker-dealer firm would need to report such a complaint if that complaint is from a customer of the firm. A question arises as to whether a complaint is from a “customer,” because user identification is not always possible through a social media channel. Some firms choose to include all social media complaints regardless of whether they have been able to identify an individual as a customer, while others provide that the firm will follow up with the individual in private channels to determine whether the individual is a customer. In our experience, the plurality of firms do not have any policy at all on customer complaints, which may be reasonable *unless* the firm chooses to use social media for the purpose of providing customer service.

Employee Use of Personal Devices. Another issue that may arise, regardless of the business purpose for using social media (but which is more likely to arise in the context of using social media for customer service),

⁷⁹ See Gina Stevens, *Data Security Breach Notification Laws*, Cong. Research Serv. (2012), available at <http://www.fas.org/sgp/crs/misc/R42475.pdf>.

⁸⁰ See FINRA, Reporting Requirements: FINRA Provides Additional Guidance Regarding Reporting Requirements Under Rule 4530, Regulatory Notice 11-32 (July 2011), available at <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p123929.pdf>.

⁸¹ Id.

⁸² Unlike FINRA, the SEC has not provided specific guidance on how customer complaints should be handled, but the firm’s compliance manual often will have a clearly delineated procedure for investigating and resolving complaints. Also, investment adviser representatives (as well as broker-dealer representatives) must report certain customer complaints periodically on FINRA Form U4. In addition, some states require that investment advisers keep records of all customer complaints. See, e.g., Wis. Admin. Code DFI-Sec § 5.03(1)(h) (2013).

is how to handle the use of personal devices by employees for business use. In an effort to provide prompt and effective customer service, some financial services companies may allow their employees to use their personal mobile devices or computers to respond to client inquires. Both the SEC and FINRA leave it to the discretion of the individual company to decide if it wants to allow this; if it is allowed, these employees must comply with all of the applicable regulations, especially the recordkeeping rules.⁸³

Since the line between personal and business communications may become blurred in some instances, we recommend as a best practice that employees be encouraged to maintain entirely separate accounts for work and personal use. If an employee is not required to maintain separate accounts and chooses to consolidate the two, then the firm must be able to retain, retrieve, and supervise all business communications, and employees should be aware that purely personal communications may be reviewed by compliance personnel. Compliance with this requirement may become more difficult as a number of states and the U.S. Congress are considering laws to protect against employers gaining access to employees' personal social media accounts.⁸⁴ As a result of this pending legislation, the line between an employee's personal accounts and business accounts may need to be hardened and more vigorously enforced, since employers may not be able to adequately supervise and retain business-related communications from an employee's personal accounts, if any such communications should occur. Additionally, the firm's social media policy should address how employees respond to business inquiries that they may receive via their personal accounts, such as requiring employees to follow-up using business email only or by responding with a pre-approved statement.

Bottom Line. If a financial services firm chooses to use social media for customer service purposes, the existing regulatory guidance leaves out some of the most important issues. While the guidance does comment on the use of personal devices and record-keeping (two important considerations), firms that restrict their compliance review to only those issues may ignore more important considerations from a compliance and risk perspective. In this context, we

⁸³ SEC Risk Alert, supra note 1; FINRA, Regulatory Notice 11-39, supra note 1; FINRA, Regulatory Notice 10-06, supra note 1.

⁸⁴ See "‘Like’ It or Not: Broker-Dealers and Social Media Access" (Law360, June 28, 2012, 1:32 PM), available at <http://www.law360.com/articles/352725/-like-it-or-not-broker-dealers-and-social-media-access>.

believe firms should focus their compliance efforts on customer privacy and data protection, as well as having clear rules for how to consider social media communications in light of rules and practices regarding customer complaints.

CONCLUSION

Regardless of the business purpose for which a firm uses social media, the time has come for firms that have not already done so to adopt written social media policies. The prevalence of social media as a method of communication shows no signs of abating; firms cannot afford to bury their heads in the sand and state that they simply do not use social media. As a factual matter, all firms are using social media, in the sense that there are employees at every firm who use social media, many of whom no doubt identify

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themselves on social networks as being employed by the firm at which they work. Furthermore, firms of any substantial size are being discussed on social media in some fashion (even if it is simply a Wikipedia page), and those that choose to ignore social media may be permitting statements about themselves to go unchallenged. In the SEC guidance, the staff stressed that firms using social media must adopt and periodically review the effectiveness of their policies and procedures regarding social media use by the firm.⁸⁵ In addition, they took the position that financial services companies need to have dedicated, unique social media policies rather than relying on an overlap of policies in other areas to cover social media concerns.⁸⁶ On this point we agree with the SEC guidance.

Despite the critics and the naysayers, social media use by the financial services industry is prevalent and it will only continue to grow as the social networks continue to expand and become further entrenched in the public's online consciousness. As more and more financial firms adopt social media as a routine part of their business, it is important for the firms to remain focused on why they are using social media in the first place. By having a clear business purpose, the firms

⁸⁵ SEC Risk Alert, supra note 1; 17 CFR § 275.206(4)-7 (2012).

⁸⁶ SEC Risk Alert, supra note 1.

will not only be more effective in their online interactions, but will also have a better understanding of the risks involved. We have identified the four major purposes for which financial services firms might use social media, and we believe this is a useful framework for considering the issues involved. That said, social media are constantly evolving, and there are other purposes for which firms can and will use social media as the platforms develop. For example, some prominent firms are using social media mentions as an early warning system of sorts to alert them to the possibility of negative press coverage regarding the firm (on the theory that social media mentions will

precede regular press mentions by crucial hours in the face of a possible crisis). Thus, we are not saying that these are the only business purposes for social media. Rather, we hope that by framing the issue in this fashion, firms will be better able to understand the power of social media, and better able to address the actual risks they face, which in some cases go beyond those identified by the regulators. We reiterate an earlier point—the lack of regulatory certainty should not lead to paralysis. We hope firms will continue to find new, innovative ways to connect with their customers and that legal and compliance departments will not be a roadblock to that progress. ■

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