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Social Media's Impact on the Fund Industry

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Social Media's Impact on the Fund Industry

- What is Social Media?
- Legal Framework and Regulatory Guidance
- Social Media in the Workplace
- Social Media Policies: Best Practices and Practical Guidance



What is Social Media?

Social Media Landscape



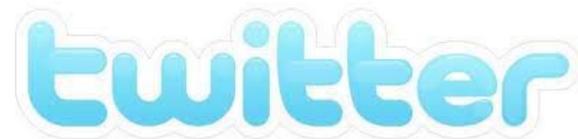
SEC National Exam Risk Alert:

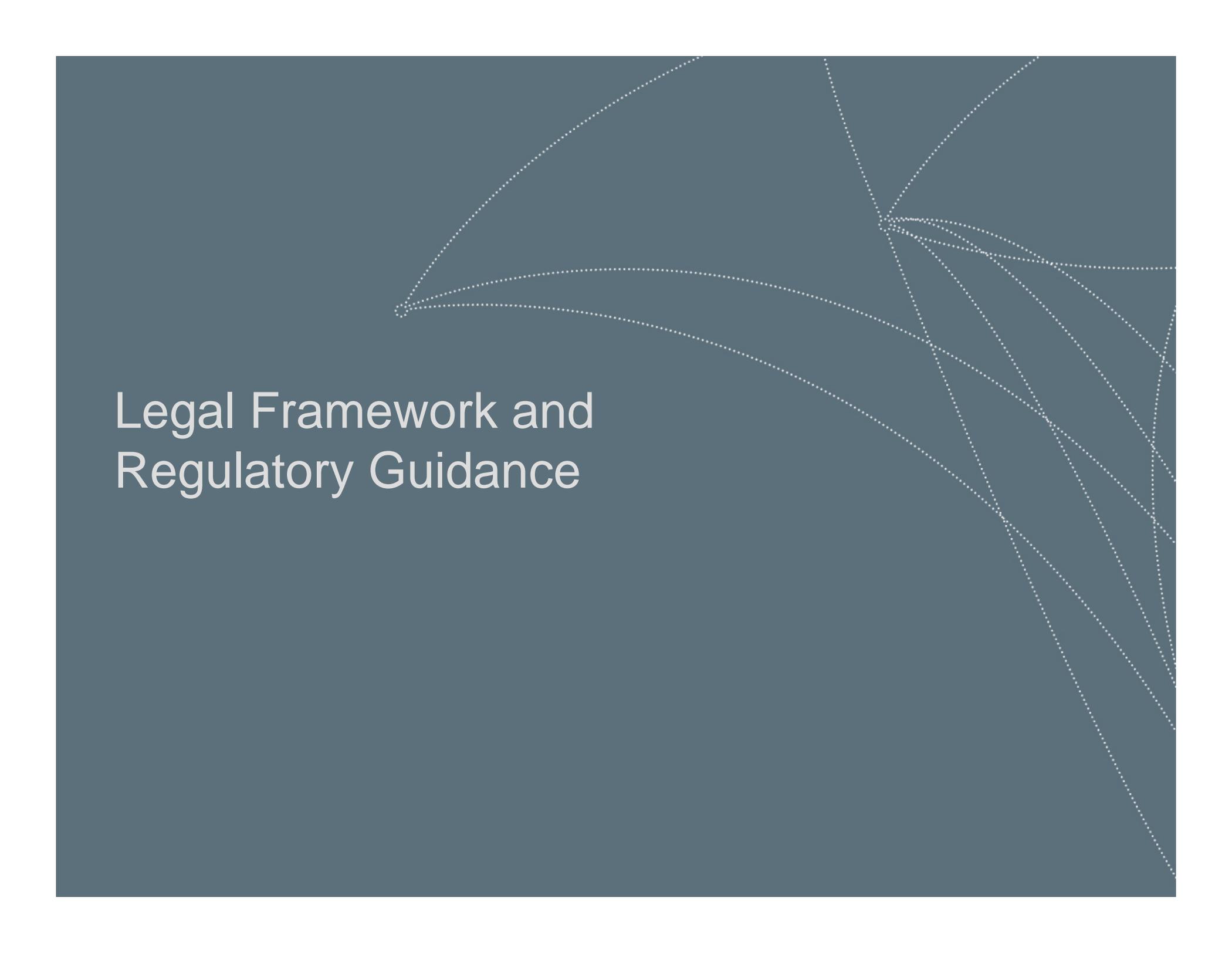
- “Social media is an umbrella term that encompasses various activities that integrate technology, social interaction and content creation. Social media may use many technologies, including, but not limited to, blogs, microblogs, wikis, photos and video sharing, podcasts, social networking and virtual worlds.”
- “Social media is landscape-shifting. It converts the traditional two-party, adviser-to-client communication into an interactive, multi-party dialogue among advisers, clients, and prospects, within an open architecture accessible to third-party observers. It also converts a static medium, such as a website, where viewers passively receive content, into a medium where users actively create content.”
- Source: National Examination Risk Alert, January 4, 2012, SEC Office of Compliance Inspections and Examinations

Common Uses of Social Media:

- General marketing
- Expanding brand awareness
- Promoting a firm's website
- Building customer loyalty
- Connecting and educating clients and potential clients
- Servicing clients
- Customer and market research
- Employment advertisements
- Recruitment and Hiring
- Community outreach
- Litigation
- Internal communications

Social Media commonly used in the financial services industry





Legal Framework and Regulatory Guidance

Legal Framework and Regulatory Guidance

- **Statutory Provisions Impacting Social Media Use:**
- **Anti-Fraud Provisions:**
 - Section 206 of the Investment Advisers Act
 - Section 17(a) of the Securities Act
 - Section 10(b) and Rule 10b-5 under the Exchange Act
 - Section 34(b) of the Investment Company Act
 - FINRA Rule 2210
- **Advertising Rules:**
 - Rule 206(4)-1 under the Investment Advisers Act
 - FINRA Rule 2210
 - '33 Act Rules 482 and 156
 - Rule 34b-1 under the Investment Company Act

Continued... **Legal Framework and Regulatory Guidance**

- **Compliance/Supervision Rules:**
 - Rule 206(4)-7 under the Investment Advisers Act
 - Rule 38a-1 under the Investment Company Act
 - NASD Rule 3010

- **Recordkeeping Rules:**
 - Rule 204-2 under the Investment Advisers Act
 - '34 Act Rules 17a-3 and 17a-4
 - NASD Rules 2211, 3010
 - FINRA Rules 2210, 4511
 - Section 31 and Rule 31a-2 under the Investment Company Act

- **Suitability:**
 - NASD Rule 2111

- **Private Offerings:**
 - Reg D 502(c)

Advisers Act Rule 206(4)-1 -- Advertisements

- Any written communication addressed to more than one person which offers any analysis, report or publication regarding securities, any device for making securities decisions, or any other investment advisory services regarding securities
 - May include emails, websites or social media posts
- Prohibition on using advertisements that contain “untrue statements of material fact” or are “otherwise misleading”
- Specific prohibitions:
 - Testimonials
 - Past specific recommendations
 - Graphs, charts and formulas
 - Free reports and services

SEC Guidance - OCIE National Examination Risk Alert, *Investment Adviser Use of Social Media*, January 2012

- Social media is subject to the advertising rules, including recordkeeping and production requirements
- Firms should identify risk exposure given their operations
- Firms should test whether their compliance policies and procedures effectively address risks
- Firms may be responsible for third-party content

Continued...

National Examination Risk Alert

- **Factors in Evaluating Effectiveness of Policies and Procedures:**
 - *Usage guidelines*
 - *Content standards*
 - *Monitoring*
 - *Frequency of monitoring*
 - *Pre-approval of content*
 - *Firm resources*
 - *Criteria for approving participation*
 - *Training*
 - *Certification*
 - *Functionality*
 - *Personal/Professional sites*
 - *Information security*
 - *Enterprise-wide sites*
 - *Third-party postings*

Continued...

National Examination Risk Alert

- **Rule 204-2 and Recordkeeping:**
- Records relating to a firm's "advisory business" must be kept
- If records are kept in electronic format, must be arranged and indexed to promote easy access
- Conduct employee training regarding required records and periodically test to make sure employees are not destroying required records
- Consider use of third-party vendors to keep records

Regulatory Considerations – FINRA Guidance

- **FINRA Regulatory Notice 10-06**
 - Communication via the Internet, including social networks, is treated the same as in-person or written communication
 - Static postings on publicly available web sites are considered advertisements
 - Participation in forums such as chat rooms, online seminars, and other such interactive electronic forums is considered a public appearance (as defined in NASD Rule 2210, now FINRA Rule 2210)

Regulatory Considerations – FINRA Guidance

- **FINRA Regulatory Notice 11-39**
 - Responds to industry questions from Notice 10-06 by providing clarification concerning application of the rules to new technologies.
 - Recordkeeping
 - Supervision
 - Links to Third Party Sites
 - Data Feeds

Other Regulatory Considerations

- State Guidance
 - Massachusetts Secretary of State Guidance on the Use of Social Media by Investment Advisers
- Private Offerings
 - No general solicitation or advertising
 - Impact of the JOBS Act
- CFTC / NFA Considerations
 - CTA exemption 4m(1)
 - CPO exemption 4.13(a)(3)
 - NFA advertising guidelines



Legal Framework and
Regulatory Guidance –
Third-Party Posts and Content

Testimonials

- Includes an explicit or implicit statement of a client's experience with, or endorsement of, an investment adviser
- “Likes” and LinkedIn recommendations *could* be prohibited testimonials
 - Poorly received by the industry—Facebook “likes”
 - ...but a careful reading of the SEC Alert reveals a “facts-and-circumstances” test

Adoption and Entanglement Theories

- Entanglement – the firm was involved in the content’s creation or preparation
 - A firm pays for an industry study
 - Soliciting a recommendation on LinkedIn
 - Linking to an affiliate’s content
- Adoption – generally, an adviser has explicitly or implicitly through its actions adopted or endorsed content after it was created
 - Selectively removing content, such as unfavorable material
 - “Retweet” blog content
 - Facebook “likes”

Continued...

Adoption and Entanglement Theories

- Links to third-party sites
 - SEC and FINRA have used adoption and entanglement theories in the context of a firm's responsibility for third-party information that is hyperlinked to its website
 - Firms cannot know or have reason to know that the linked website contains false or misleading information
 - Disclaimers are useful for websites, but may not be available in certain Social Media
- Recordkeeping requirements may apply to third-party Social Media content

Disclaimers

- Firm is not affiliated with [insert name of third-party social media site] - use at your own risk
- Firm is not responsible for and does not endorse any content, advertising, advice, opinions, recommendations or other information from third parties, including [the social media site]
- Opinions, comments expressed by [friends or followers] are those of the persons submitting them and do not represent the views of the firm or its management
- Firm does not endorse or approve content submitted by third parties, or endorse individuals or organizations, by using any features on this site
- Firm reserves the right to block or remove any third-party content deemed illegal, inappropriate or offensive
- Firm may block any posts that are testimonials, advice, recommendations, or advertisements for specific products or services

The background is a solid dark blue color. Overlaid on this are several white dotted lines that form a network of curved paths. These lines originate from various points and curve across the frame, creating a sense of movement and connectivity. The lines are most prominent on the right side of the image, where they appear to converge and then diverge again.

Social Media in the Workplace

Social Media in the Workplace

- Is it legal to use social media in recruiting and hiring?
- What steps can a firm take to protect its IP from disclosure or loss through social media?
- Why does my non-unionized firm need to be concerned with the NLRB when it comes to social media?
- How is social media impacting employment litigation?



Use of Social Media in Recruiting and Hiring: Is it legal?

Is it legal?

Benefits:

- Access to information not otherwise available
- Little to no cost to employers

Risks:

- Control of process
- Use of information
- Transfer of information

Lawful Uses of Social Media information

- Discover unprotected characteristics/activities
 - Illegal drug use
 - Support of racist/discriminatory groups
 - General poor judgment in maintenance of online persona
- Assess cultural “fit”

Potential New Hires?



Privacy Implications

- Requiring Access—pending legislation
- Use of Information
 - Discrimination/too much information
 - Invasion of privacy
 - Defamation
 - Data privacy – strict international data transfer regulations
- Searching
 - Website Terms of Use
 - Fair Credit Reporting Act

EEOC and Discrimination Considerations

- Discrimination in the form of Disparate Treatment can occur if decision-makers check social media sites for only certain individuals and/or use information from these sites in different ways for different applicants or employees
- If an employer relies heavily on social media information for employment decisions, they may have a Disparate Impact issue
 - Members of a particular race, gender or age group may be more likely to use social media
 - Older individuals or those with disabilities may be less likely to use social media

Terms of Use

- Terms of Use may include restrictions on how information found on a site may be used.



- Facebook → “You will not ... take any action on Facebook that infringes or violates someone else's rights or otherwise violates the law.”



- Westlaw → Employers may use this site to perform people searches or search a person's involvement in judicial proceedings.
 - Westlaw's terms of use explicitly preclude use of information found in its database for employment screening.

Continued...

Terms of Use

- By clicking “accept” on an Internet site’s terms—or even by merely using a site—an employer likely agrees to a contract governed by the laws of the state specified, often California.
- Employer may even be subject to being sued in a foreign state.



- Google → “By using our Services, you are agreeing to these terms...All claims arising out of or relating to these terms or the Services will be litigated exclusively in the federal or state courts of Santa Clara County, California, USA, and you and Google consent to personal jurisdiction in those courts.”

The background is a solid dark blue color. Overlaid on this are several white dotted lines that form a complex, abstract pattern of curved and intersecting paths, resembling a stylized network or a series of overlapping arcs.

Does Third Party Searching
Insulate a Company from
Liability?

Fair Credit Reporting Act

- Covers much more than just credit reports!
- Any use of third party service to screen applicants may be implicated.
 - Examples:



Continued...

Fair Credit Reporting Act



- May 2011 – FTC’s Division of Privacy sent “no action” letter to Social Intelligence Corporation
 - FTC – FCRA rules apply in social networking context
 - State law

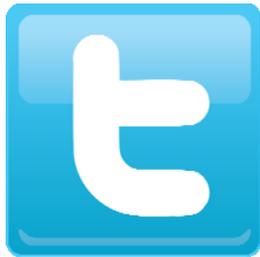
Fair Credit Reporting Act Requirements

- Employer must notify applicant/employee that consumer report will be used, and applicant/employee must consent.
- If employer relies on consumer report as basis for “adverse action,” employer must:
 - Give applicant/employee copy of report and notice of rights created by FTC before adverse action; and
 - Provide notice of adverse action and required information to follow up



What Steps Can a Company
Take to Protect Its
Proprietary Information from
Disclosure through Social
Media?

Personal Is Public



Just heard CalPERS is very pleased with #AcmeAM and will contribute more assets next qtr!

- Did your employee just publish a client testimonial?



So cool, I'm moving to London! My firm is opening a new office!

- Did your employee reveal expansion plans that are not yet public?

Social Media Account and Content Ownership

- Ownership of twitter followers – *Phone Dog* case
- Ownership of Linked-In account following acquisition—*Eagle* case
- Trade secret protection

Social Media Ownership Issues

- Who owns social media posts and profiles?
- What happens when an employee leaves?
 - Protocol for Broker Recruiting
- Can an employee publicly share his or her departure?

Practical Steps to Take

- Develop and implement NDA with any parties with whom the firm shares its confidential information and label items “Confidential”
- Adopt appropriate firewall and password-protected measures for digitally stored and shared documents
- Enter into agreement with employees addressing social media content and account ownership
- Act promptly at the end of an employment relationship

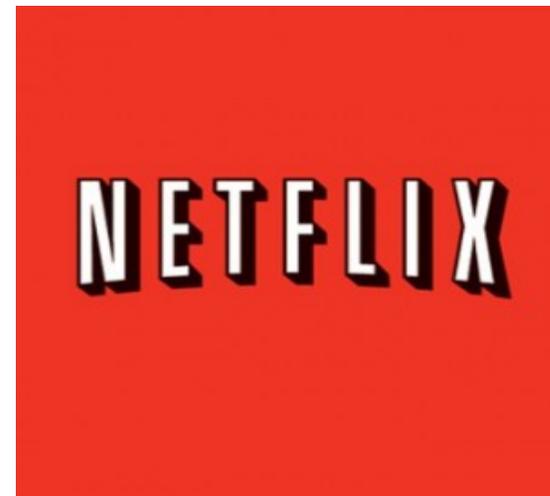
Social Media – Securities Implications

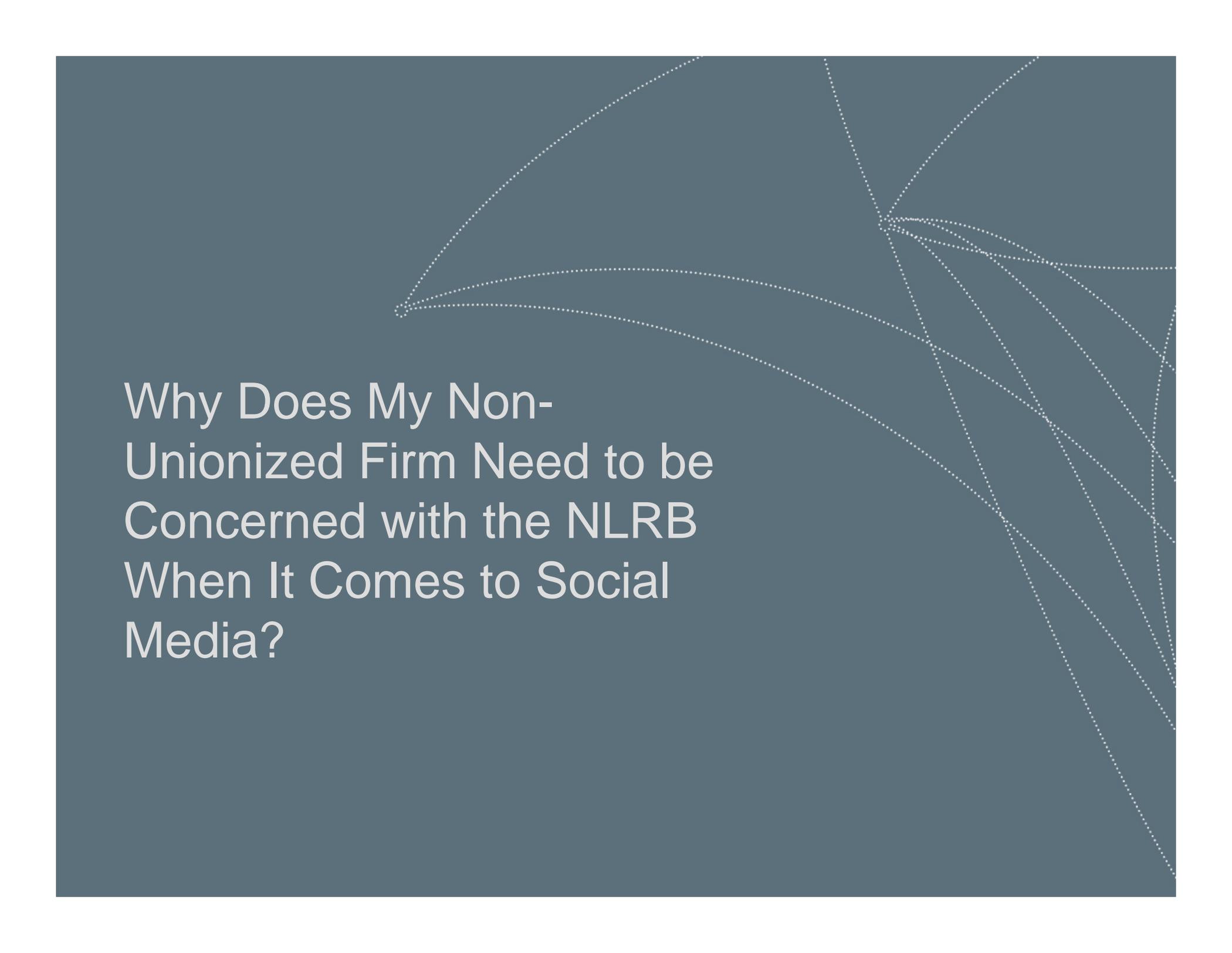
- Example: Blogs
 - FTC investigation of Whole Foods Market's CEO's online postings
 - SEC concern regarding violation of Reg FD



Social Media – Securities Implications

- Netflix CEO posts a message regarding viewership growth on Facebook
- Netflix stock rises 20% in 3 days
- Netflix receives a Wells Notice
- Is Reg FD out of date?
 - Netflix had over 200,000 followers, including many reporters





Why Does My Non-
Unionized Firm Need to be
Concerned with the NLRB
When It Comes to Social
Media?

Increased Authority of NLRB

- Section 7 of NLRA applies to all employers
 - Provides employees with right to “...engage in other concerted activities for purpose of collective bargaining or other mutual aid or protection”
- NLRB now bringing ULP charges against employers – union and non-union – who discharge or discipline employees for posting comments on Facebook about working conditions
- NLRB scrutinizing social media policies for ALL employers (even non-unionized) and finding unlawful interference with concerted activity

NLRB Concern: Chilling Exercise of §7 Rights

- “unauthorized posting, distribution, removal or alteration of any material on Company property”
- Prohibition against discussing private matters of other employees
- Prohibition against sharing, transmitting or storing “sensitive information”
- Prohibition against sharing “confidential” information such as employees’ names, addresses, phone numbers and emails
- Statements that damage company or any person’s reputation
- *Costco Wholesale Corp.*, 358 NLRB 106 (2012)



Social Media in Litigation

Social Media in Employment Litigation

- Retention policies – ESI
 - Spoliation
- Acceptable breadth of discovery
 - litigation strategy
- Privacy rights
- Ethical considerations

Social Media in Litigation – Facebook Example

- Targonski v. City of Oak Ridge



Tina- And-Mike Targonski We're having so much fun at the cabin!!! But my BFF is ignoring me...shes checking her stupid facebook status in the living room. I wish she would get off the computer and come out here and play pool :-)

February 23 at 1:26pm



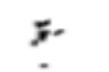
Rachael Powers why do you have to be so hurtful with me in the next room? bahahahaha

February 23 at 1:29pm



Marianne Right vacationtime... hide the computers and cell phones come on people...have fun!!!!

February 23 at 2:03pm



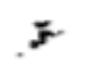
Caryn Morgan Heltz Oh no she isn't because I'm at stupid world!!! :(:-p

February 23 at 4:46pm



Tina- And-Mike Targonski well if you were a true bff, you'd be here naked in the hot tub with me!!!! I love you !

February 23 at 10:56pm



Caryn Morgan Heltz Don't tempt me snahahahaha You know you're the only one for me...Eric is just my cover LOL :*

February 23 at 10:58pm



Tina- And-Mike Targonski Ooooooh...and he's going to be out of the country soon :-)

February 23 at 10:59pm

Continued...

Social Media in Litigation – Facebook Example

- Targonski v. City of Oak Ridge



Tina- And-Mike Targonski ATTENTION CABIN PARTY ATTENDEES: The address is 3415 No Business Way, Sevierville, TN 37876. You can mapquest it and should be fine. If you don't feel comfortable with that, call me and I'll give you directions.

February 22 at 3:09pm



Rachael Powers I will mapquest it, but I bet a hundred bucks I still get lost lol

February 22 at 3:47pm



Jamil Lowe Are ya having fun yet? See ya tomorrow. Did you find Twister?

February 22 at 4:21pm



Marianne Kight You all going back up to the cabins????

February 22 at 4:50pm



Tina- And-Mike Targonski OMG I forgot to get a Twister...anybody have one? (I promise, where I come from, we dont condone naked twister, so please dont feel intimidated or worried! lol)

February 22 at 7:47pm



Rachael Powers well, where I come from we dont even mention naked twister...I dont think we can be friends anymore and I will make sure to tell everyone it was because you wanted to sleep with me and mike asked to take pictures hahaha

February 25 at 4:40pm



Jamil Lowe Im shocked at both of you and your behavior.

February 26 at 8:50pm

Continued...

Social Media in Litigation – Facebook Example

- Targonski v. City of Oak Ridge

→  **Tina- And-Mike Targonski** Thanks to everybody who made last night so much fun! And no, there werent any orgies and there was minimal camera use.
May 22 at 1:58pm via Text Message

 **Tammy Bates Tankersley**
glad you had a blast with no drama!!! You guys deserve it
May 22 at 2:16pm

 **Marianne Kight** hmmm...makes a mama wonder... but whatever...glad they had fun...
May 22 at 3:15pm

 **Cassie Bridges** LOL!!!
May 22 at 3:39pm

 **John Criswell** No comment.....
May 22 at 3:51pm

 **Rachael Powers** yes the cameras and orgies are reserved for cassie and I ;O)
May 22 at 6:12pm

 **Cassie Bridges** JUST ME ,YOU, AND TINA,OH AND MIKE GET TO TAPE EVERYTHING!!!! LOL!!!! HELL WE SHOULD MAKE ALL THOSE RUMORS TRUE THAT JOHN WAS TELLING!!!!
May 24 at 6:39am



Social Media Policies: Best Practices and Practical Guidance

Social Media Policies – The Big Picture

- The potential benefits from using social media increase as employees are allowed greater freedom to interact with the public
- So do the risks
- A firm should determine its risk tolerance for using Social Media before implementing policies

Continued...

Social Media Policies – The Big Picture

- What type of Social Media firm are you?
 1. Absolute prohibition
 2. Prohibition on content re: firm's business activities
 3. Business content through "official" channels only
 4. Co-opt personal posts through standards or review
 5. Absolute freedom
- Absolute prohibition and absolute freedom are impracticable for financial services firms
- The success of the other strategies will depend on risk control through thoughtfully designed and implemented policies

Social Media Use by Investment Advisers

- 80% of firms have adopted formal written policies and procedures to govern the use of social networking by the firm and/or employees, up from 64% last year
- 54% of firms test compliance with social media policies; 24% quarterly, 47% annually or semi-annually
- Annual testing is most common (31% of firms), but 24% of firms test social media policies quarterly
- 54% of firms prohibit using personal social networking sites for business purposes

▪Source: Investment Adviser Association 2012 Investment Management Compliance Testing Survey



Developing and Administering Social Media Policies

The Need for Policies and Procedures

- Under the Advisers Act, no failure to supervise if:
 - Procedures reasonably be expected to prevent violations
 - Duties reasonably discharged
- Rule 206(4)-7:
 - Written policies and procedures reasonably designed to prevent violation of the Advisers Act
 - Is it reasonable to not have a Social Media policy after the SEC National Exam Risk Alert?
- NASD Rule 3010:
 - Written supervisory procedures regarding firm business, and the activities of associated persons
- Reduce business risks associated with recruiting, hiring, retention, and litigation

Risk Assessment

- Identify business purposes, identify risks, and draft procedures around this risk assessment
- Coordinate legal/compliance, IT, HR, and privacy departments on enterprise-wide basis to ensure policy addresses applicable laws
- Address separate business and personal accounts
- Define “Social Media” and state the firm’s philosophy
- Tailor your policy to the specific risks of your organization

Draft a Social Media Policy

- Establish a formal policy before providing any guidance to employees regarding use of Social Media
- Specifically identify:
 - Permitted or prohibited sites
 - Permitted or prohibited features of those sites
 - Who can represent the firm
 - Who maintains passwords
- Address use on personal devices
- Establish a standard and a process for compliance review
- Consider addressing inappropriate personal uses of social media (e.g., defamatory or illegal content, disparagement of competitors, company logo or endorsements)

Implement a Social Media Policy

- Social media training
 - Social Media changes quickly—plan frequent, smaller training modules
 - Use training to learn from employees—they will think of usage you did not know was possible
- Establish a social media review team—consider business, compliance, legal
- Monitor social media sites frequently and efficiently
- pre- or post- review by compliance (or both)

Continued...

Implement a Social Media Policy

- Monitor employees, follow-up on “red flags,” and take disciplinary actions for violations
- Consider a vendor for monitoring, site-blocking, and recordkeeping (See Appendix)
- Monitor changes to features/settings on permitted sites and modify policy as appropriate
- Test procedures – are they effective, do they address changing or new technologies?
- Incorporate social media into your ongoing risk assessment and annual review process

Commenting Guidelines For Firm-Hosted Content

- No personal information or information about an individual's accounts
- No testimonials about how well a client has done by investing with the firm
- No investment advice or recommendations about specific stocks or funds
- No attacks on the firm or fellow viewers
- No offensive or defamatory comments
- No illegal information, such as material, non-public information (insider trading)
- No customer-service related questions
- Read [insert name of third-party social media site's] terms of service and privacy policy, as they apply to communications through the page/account

Guidelines for Personal Activity

- Identification as an employee of the firm
- Referral of clients, customers, partners—business activities may entangle the firm
- Investment recommendations and discussion of past recommendations should be prohibited
- Address confidentiality of firm data
- Consider standards for interactions with other personnel of the firm

Guidelines for Third-Party Content

- Consider disabling or blocking third-party posts on the firm's Social Media pages
- Use disclaimers, if available
- Compliance should review links and "re-tweets"
- Be careful managing content—it may be misleading to delete negative third party content, leaving only positive remarks

Best Practices for Using Social Media in Recruiting, Hiring and Employment

- If you are recruiting through Social Media, adopt formal, consistent procedures and require uniform use
- Have non-decisionmakers do the searching and report only job-related information
- Comply with Terms of Use of relevant sites and avoid improper search tactics
- Provide ongoing employee education and training
- Update authorizations/releases for background checks
- Supplement internet searches with other assessments, i.e. reference checks, second interviews

Continued...

Best Practices for Using Social Media in Recruiting, Hiring and Employment

- Update Social Media policies regularly
- Consider whether any aspect of a social media search could be considered discriminatory
- Make sure there is a legitimate nondiscriminatory basis for employment decisions
- Be aware of NLRB rules concerning social media
- Firm's corporate conduct code is always applicable

Recordkeeping – Regulatory Considerations

- The SEC views all electronic communications as written communications
- Advertisements and client communications via Social Media are subject to rules applicable to funds, adviser, and broker-dealers
- If you can't keep appropriate records of an activity, it should be prohibited
- Consider third-party record capturing software
 - Iron Mountain
 - Microsoft
 - Others (See Appendix)
- Establish a process for determining which Social Media communications are required records

Recordkeeping—Additional Considerations

- E-discovery rules apply equally to social media
 - FRCP 16, 26, 33, 34, 37, 45
- Retention requirements: personnel files, FLSA, ERISA, ADEA, ADA, USERRA
- Rules of Evidence
 - Business record exception to hearsay rules (FRE 803 (b)(6))
 - FRE 502
 - FRE 901

Other Policies to Update

- Anti-harassment / discrimination / retaliation policy
- Discipline / termination policy
- Confidential information / trade secret policy
- Cellphone / driving policy
- Working hours policy
- Open door policy
- Acceptable usage policy
- Workplace privacy

Industry Specific Best Practices

- Emphasize to employees the importance of good judgment
- Put someone in charge of compliance and ESI policies
- Clearly define employees' use of social media
- Keep good records and expect them to be discoverable
- Take advantage of existing compliance technology



Appendix – Resources

Resources – Monitoring Software Vendors

- Google www.google.com/alerts
- Infegy <http://infegy.com/>
- BrandProtect www.Brandprotect.com
- Nielsen www.Nielsen-online.com (BuzzMetrics)
- Radian6 www.Radian6.com
- Sysomos www.sysomos.com
- Visible www.visibletechnologies.com
- Spredfast www.spredfast.com
- Viralheat www.viralheat.com

Resources – Capture Software Vendors

- LiveOffice www.liveoffice.com
- Socialware www.socialware.com
- Erado www.erado.com
- Flowtown (for ROI research) www.flowtown.com



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Mr. McGrath practices in the area of investment management and securities law, and focuses on advising investment advisers, broker-dealers, commodity trading advisers, and commodity pool operators in connection with the legal and regulatory aspects of their global operations. He also advises clients with respect to the structuring and offering of mutual funds, hedge funds, and private equity funds.

Mr. McGrath has extensive experience counseling investment advisers regarding their regulatory compliance obligations, and in connection with SEC staff examinations. He also has experience drafting and negotiating derivatives instruments on behalf of investment managers. Mr. McGrath is a CFA charterholder, and has held Series 7, 24, and 66 licenses over his career.



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Ms. Johnston concentrates her practice in the employment and labor area where she represents employers in a wide range of matters. Ms. Johnston has significant experience representing employers in contract disputes, noncompetition and misappropriation of trade secret cases, discrimination, harassment and retaliation cases, wage and hour disputes, employee misconduct matters, and tort-based claims. Ms. Johnston also advises and counsels employers regarding employee relations, employment practices and procedures and compliance with state and federal employment and labor laws and regulations.

Ms. Johnston advises companies on social media policies and related issues. She also has experience advising companies and litigating disputes related to data privacy breaches and compliance with data privacy regulations. Ms. Johnston frequently collaborates with employee benefits specialists to address executive compensation and employee benefits matters. She regularly assists with due diligence, disclosures, employment and restrictive covenant agreements and other employment matters in business transactions.

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