

Despite 'old rules,' firms can plumb social media in compliant ways

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Know the **SEC's** advertising and marketing rules, create a social media policy, train staff and dive into the new media with a pilot project.

That's among the advice passed on during **IA Watch's** June 19th webinar, [*Advertising & Marketing Rules: What's Expected of CCOs, Plus How Your Peers are Using Social Media in Light of the New Exam Alert*](#).

[Rule 206\(4\)-1](#) broadly defines advertising, as "any notice, circular, letter or other written communication addressed to more than one person." Although that old language doesn't make note of a public website, a web page could be viewed as an advertisement, said **Jennifer Porter**, senior counsel in the **SEC's** Office Of Investment Adviser Regulation.

We've previously detailed the key components of the SEC's advertising and marketing rules - honed through years of no-action letters (e.g., no testimonials, falsely describing a service as free, untrue statements, certain use of past-specific recommendations and charts and graphs to pick securities) ([IA Watch](#), April 18, 2011).

"We're dealing with old rules" in a world of new media, said **Michael Sherman**, a partner with **Dechert** in Washington, D.C. He urged firms to "err on the side of caution" when posting materials online. Ask if the post constitutes an offer of advisory services - part of the legal definition of an ad, he said.

Another question to ask yourself

Porter offered a shorthand analysis: "Are the materials designed to maintain existing clients or attract new ones?" For example, say an employee doesn't mention his firm on his **Facebook** page but posts his excitement about the baseball season. This is not an advertisement.

Snow Capital Management (\$2.7B in AUM) in Sewickley, Pa., was hesitant at first to explore new media, said Compliance Officer **Abby Katzen**. Its advertising firm persuaded it to try the media. The RIA now maintains a presence on [Facebook](#), [LinkedIn](#) and **Twitter**. Staff can put up a LinkedIn profile.

Firm guidelines permit the posting of links to news articles that mention the rep or firm as well as press releases and speaking engagements. Forbidden items include performance advertising and investment recommendations. And "we don't want anything that could even be construed as a testimonial," said Katzen. "That's part of our conservative approach."

All posts must be pre-approved by the compliance staff. There are only a few each month, so monitoring isn't onerous. Compliance is linked to each rep's LinkedIn page and regularly reviews them for accuracy. The reps are instructed that their business communications must go through the firm's e-mail system so as to be archived, said Katzen.

"Every single Tweet is reviewed and signed off by us," said **David Chung**, senior compliance officer of sales and marketing practices at **ING Investment Management** (\$64B in AUM) in New York. The same rings true for any posts to [Facebook](#) and [LinkedIn](#), he continued. He has weaved the social media reviews into his existing process for examining traditional advertising and marketing.

Chung shared do's and don'ts for the new media, including green lights to discuss macroeconomic concepts, industries or sectors and retirement concepts. Red lights flash for mentioning the name of a stock or providing investment advice.

The same recordkeeping and monitoring responsibilities fall to firms for social media as for traditional advertising, a message dispensed in the [SEC's exam alert](#) earlier this year ([IA Watch](#), Jan. 9, 2012).

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If you remain leery to jump into the new arena, you could consider using a quarterly certification form signed by employees pledging they won't engage in business use of social media sites, said **Michelle Kennedy**, president of **Compass Compliance Services** in Greenville, S.C. This may allow you to skip monitoring and archiving of their pages. But be sure to have a policy in place that specifies what's permissible first, she cautioned.

Smaller firms are trying social media because it's cheap, she continued. Those that do tend to randomly sample archived pages. The principals may use the media to communicate about their hobbies and passions. For instance, one adviser focuses posts on such as taking care of aging parents and investing. Another boasts of his interest in travel and wine.

Exam focus

Advertising and marketing remains a hot topic on SEC exams. Kennedy told of a recent experience in which examiners questioned a firm about switching from one index to another in its marketing. "It looked like they were trying to pick the most favorable" one, she said. "Fortunately they found the investment committee notes where the firm had decided" that one index was more appropriate and which documented the decision to switch. "You have to be very careful," she warned.

Editor's Note: Click [here](#) to order your copy of the webinar's materials. Snow Capital's Abby Katzen will speak about her firm's use of social media at **IA Watch's [IA Compliance Fall Conference 2012](#)** in Philadelphia on Sept. 24th. Find out more [here](#).

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