

Regulatory Compliance in the Age of Social Media

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The term “social media” is a broad term that encompasses an ever-changing array of electronic platforms involving technology, user content and social interactions. Social media provides its users with a myriad of (relatively) cheap opportunities to communicate with a vast audience of friends, acquaintances and strangers in real time through a variety of technologies, including picture-sharing, blogs, instant messaging and interactive forums.

Social media provides Dealer Members and Approved Persons with powerful and effective new ways to enhance existing client relationships through a variety of modes of communication. Social media also offers a broad base of potential clients: social media can be used to capitalize on existing relationships through interactive networking to reach broader audiences, and to identify and contact strangers who may be receptive to a Firm’s services.

Given the marketing and business development opportunities it presents, it is no surprise that social media usage is on the rise in the financial services industry. As noted by the US Securities and Exchange Commission (the “SEC”),

“The use of social media by the financial services industry is rapidly accelerating. In growing numbers, registered investment advisors (RIAs” or “firms”) are using social media to communicate with existing and potential clients, promote services, educate investors and recruit new employees.”¹

The 2012 survey of investors conducted by the Canadian Securities Administrators (“CSA”) revealed that social media is an emerging investment tool: one third of survey respondents reported using at least one social media platform as a “source of information about investing.”² In its 2011 – 2012 Annual Report, the Investment Industry Regulatory Organization of Canada (“IIROC”) explicitly acknowledged the power of social media, stating “In this age of social media, we recognize that the web is a powerful resource for information that is easily accessible.”³⁴

The increasing use of social media by the financial services industry has not escaped the attention of securities regulators.⁵ On December 7, 2011, IIROC published a Rules and Guidance Notice 11-0349, entitled “Guidelines for the review, supervision and retention of advertisements, sales literature and correspondence” (the “Notice”). As discussed in detail below, the Notice clarifies that all communications, including communications via social media, are subject to the IIROC Dealer Member Rules (the “Rules”), and addresses the “unique compliance and supervisory issues” social media presents.

The reality is that the unique compliance and supervisory issues raised by social media must be specifically addressed in Dealer Member Firm policies and procedures. This paper discusses some of the issues raised by the Notice and related Rules in the context of IIROC's content-and-purpose approach to classifying communications and the unique nature of static and interactive social media content. While this paper is far from an exhaustive guide to the regulatory obligations of Dealer Member Firms who choose to use social media, it does highlight some major areas for consideration in designing policies and procedures to govern Firm engagement in this new and rapidly expanding arena of electronic interaction.

IIROC Notice 11-0349

IIROC published the Notice 11-0349 on December 7, 2011. The Notice, which replaced Member Regulation Notice MR028⁶, responds to the significant changes to the landscape of Firm and Approved Person communications as a result of the increased prevalence and variety of social media websites and platforms, and to Dealer Member inquiries regarding the application of Rule 29.7 and other Rules to these new modes of communication.

The Notice clarifies that all methods of communication, including the various forms of social media, are subject to the Rules and securities legislation, stating:

“[W]hether materials are classified as advertising or sales literature will generally be determined by their content and purpose rather than by the method of communication used. Accordingly, electronic communication, including social media websites, may constitute advertising, sales literature or correspondence depending upon their content and purpose.”⁷

In discussing social media content, IIROC focuses on the degree to which an author maintains control of the communication in question, drawing a distinction between static and interactive content. IIROC indicates that static and interactive content may attract different regulatory obligations for Dealer Member Firms. While IIROC has not defined either term, general characteristics of each can be inferred from the discussion in the Notice, as well as other regulatory commentary. This is discussed more fully below.

Depending on the classification of the communication, it may engage various Rules or Instruments. The Notice, and this paper, focuses on the review, supervision and record-keeping requirements set out in Rule 29.7 and National Instrument 31-103, respectively.

Rule 29.7: Pre-Approval, Review and Supervision Requirements

Pursuant to Rule 29.7, IIROC Dealer Members are required to review and supervise advertisements, sales literature and correspondence related to its business⁸ (“Business Communications”). Subject to certain specific requirements, Firms may

exercise their discretion in deciding whether to review and pre-approve communications or to supervise and conduct post-publication review of business communications.⁹

Dealer Members are required to pre-approve “original advertisements/original template advertisements” and “any material used to solicit clients that contains performance reports or summaries”, as well as research reports, marketing letters, telemarketing scripts, and promotional seminar texts.¹⁰ Advertising is broadly defined to include “any published material including materials disseminated or made available electronically promoting the business of a Dealer Member.”¹¹ Original advertising refers to the first instance of an advertisement, including one-of advertisements and template advertisements. Template advertising refers to an advertisement based on a pre-set, customizable format, the content of which changes in varying degrees each time it is used¹². The first time a template advertisement is used, it constitutes original advertising and must be reviewed; subsequent uses may or may not require pre-approval, depending on the extent of the changes made¹³.

To the extent that communications are not caught by Rule 29.7, Dealer Members may exercise their discretion in supervising and/or reviewing such communications. This discretion must be exercised in a manner that ensures that communications are either pre-approved, reviewed post-use or sampled post-use in a manner which is “appropriate to the type of material.”¹⁴ In the case of social media, a consideration of the “type” of material will include determining whether it is static or interactive content.

National Instrument 31-103: Record-Keeping Requirements

Dealer Members are required to keep records of their “business activities, financial affairs, client transactions and communication.”¹⁵ Firm record-keeping policies should include policies requiring that records be kept of such documents, and also policies requiring that records be kept of steps taken to comply with the Firm’s review and supervisory obligations.

IIROC’s Approach to Social Media Content

In discussing the classification of social media communications, IIROC draws a distinction between static content and interactive content, indicating that different requirements may apply to each. It is imperative that Dealer Member Firms who choose to engage in communications through social media understand both the distinctions between static and interactive content, and the limitations inherent in these distinctions, in order to effectively design policies and procedures for Firm social media use. Dealer Member Firms must understand and enunciate these differences in their social media policies and procedures .

Static Content

Static content is usually published by the social media user only, about him or herself, and is not subject to real time or other changes by third parties. FINRA notes that static content is generally accessible to all viewers (as opposed to a private message) and that it generally remains visible until it is removed¹⁶.

In the context of social media, static content often consists of the identifying, descriptive and historical information that users provide to establish their social media persona, establish the basis for connections, and attract visitors to their profile, page or blog. Static content often includes name, address, telephone numbers, educational and work history, and a general description of areas of interest and/or expertise. Profiles, “background” descriptions and “wall” information are all examples of static content.

Static social media content often resembles traditional advertising, correspondence and sales literature in that the author retains control of the whole of the communication. The nature of static content may make it easier to pre-approve, review and retain. The real issue for Firms in respect of static content is the proper classification and treatment of social-media-user-generated static content.

IIROC has noted that static social media will usually be considered “original template advertising” and will therefore require pre-review and approval.¹⁷ Since uses of template advertising also require post-use review, Firms should consider the best way to monitor such static content, such as, for example, requiring that the Firm be notified of any changes to static content.

Interactive Content

Interactive content includes content that engages with third parties. Real-time, user generated interactive content is one of the core characteristics of social media. It is both what makes social media such a powerful and attractive mode of communication, and also what makes it so difficult to regulate. Social media offers a plethora of real-time interactive content options, ranging in audience size from one-on-one instant messaging and texting to widely accessible online forum discussions, twitter posts and facebook commentary.

Interactive content poses a number of potential issues when it comes to supervising, reviewing and retaining records of these communications. The real-time, spontaneous and speedy nature of interactive social media makes it practically impossible to pre-review and approve. It may also be very difficult to supervise or record.

IIROC has stated that: “An interactive electronic forum...includes real time discussions and although it does not require prior approval, must be supervised to ensure compliance with IIROC Dealer Member Rules and securities legislation.”¹⁸ This assertion appears to be premised upon the assumption that such interactive communications will not include communications of the type that require pre-approval, such as advertising. Dealer Member Firms should ensure that their social

media policies and procedures clearly define permissible and prohibited interactive communications.

A Distinction Without A Difference?

In designing social media policies and procedures, Firms should consider the fact that the distinction IIROC draws between interactive content and static content does not always accurately capture the realities of communications via social media. In the Notice, IIROC acknowledges that interactive content may be converted into static content which may require additional review, supervision or recording¹⁹.

Third Party Content

IIROC stated in no uncertain terms that Firms should be extremely cautious when considering engaging in third-party communications. Interactive communications with third parties via social media pose a number of risks for Dealer Member Firms.

Seemingly innocent acts, such as reposting or “liking” third party content may be characterized as an endorsement of the content by the Firm. Tagging or “liking”²⁰ content are actions which would be nearly impossible to supervise or review.

Firms have no control over what third parties will do with the interaction, as demonstrated in the example provided below. Third party actions are also very difficult to trace, making supervision or review and record keeping nearly impossible.

For example, consider this (admittedly exaggerated) example of an instant message conversation between an Approved Person and another individual:

User: Hey – what are you up to?

Approved Person: Oh hey! I’m just working on a blurb to submit to my boss describing my work experience for some PR pamphlet the office is putting together. Mind taking a look for me for typos/style before I submit it for approval?

User: No problem – just copy/paste it in and I’ll look at it right now.

Approved Person: Approved Person brings a wealth of experience and insight in the market to clients, and can guarantee a rate of return of 10%/year on client’s investments.

The conversation is “private” interactive content in the sense that it is immediately viewable to the two participants (and whomever else happens to be reading on the computer screen).

Now imagine that one user takes a screen shot of the conversation, as shown below, and posts it to a publicly available forum:

User: Hey – what are you up to?

Approved Person: Oh hey! I’m just working on a blurb to submit to my boss describing my work experience for some PR pamphlet the office is putting together. Mind taking a look for me for typos/style before I submit it for approval?

User: No problem – just copy/paste it in and I’ll look at it right now.

Approved Person: Approved Person brings a wealth of experience and insight in the market to clients, and can guarantee a rate of return of 10%/year on client’s investments.

That supposedly private interactive content has now been taken out of context and converted into static, publicly available content which is beyond the immediate control of “Approved Person”, its author.²¹

Considerations in Designing Policies and Procedures

In order to comply with their obligations to supervise, review and record communications, Dealer Members must be able to answer the following questions regarding their use of social media:

- Who is using social media?
- What social media platforms are being used?
- When are they being used?
- How are they being used?
- Who else is involved?

What Social Media Platforms are Being Used?

Firms should consider establishing a list of permitted social media platforms and a list of prohibited social media platforms. In constructing these lists, Firms should consider the following:

1) *Does the format used by the platform enable the Firm to review, supervise and record the communications?*

Firms should ensure that the permitted platforms allow for accurate and complete records to be made of communications on the site, and should prohibit access to all social media platforms which do not permit sufficient supervisory, review or record retention practices.

Firms must also be alert and reactive to changes in the privacy policies and controls of the social media platforms with which they engage. Social media websites may change their privacy and other settings with little notice and significant results. For example, in or around June 2012, Facebook changed the display settings related to its users' email addresses. As a result of this change, other users could see a user's email address even where that user had opted to keep their address private²². Firms should have policies in place which ensure that they have a current understanding of their permitted social media websites' policies and procedures, and that permitted users are informed of any salient changes to the platform's policies and the appropriate responses or actions to be taken.

2) *Can third party commentary be disabled?*

As identified above, interactive content may be the most difficult content to regulate. Disabling third party content limits communications to static content, making for easier supervision and review, and a tighter control on the communication.

3) *Can Firm content be "deleted" or hidden by the Firm in the event that inappropriate content was published to the platform?*

Firms should consider limiting their social media usage to platforms which permit users to delete or hide their content. The ability to delete or hide content will be very important to an effective issue and/or complaint resolution procedure. A Firm should not find itself in a position where a non-compliant communication has been made, is available to any audience, and cannot be removed.

4) *Can third party commentary on Firm content be deleted by the Firm?*

If Firms choose to engage in interactive content, they should consider limiting their participation to platforms which permit the Firm to delete or hide third party content which threatens to bring the communication into inappropriate or non-compliant territory. As noted above, the ability to remove communications from view will be an important tool in a Dealer Member's issue and complaint resolution arsenal.

How are Social Media Platforms being Used?

As discussed above, a Firm's review, supervision and record keeping obligations vary depending on the content of the communication in question. In order to comply with the Rules, Firms need to establish the kinds of communication which

are permitted through social media. This will require Firms to clearly define the kinds of regulated communications in the policies, and to enunciate guidelines delineating which kinds of communications are permitted where.

Firms should only permit the use of social media websites where an accurate record of communications made on that website may be created. Firms should also consider limiting the devices used to access and communicate over social media to devices that can be properly monitored and of which records can be created and maintained²³.

Dealer Members should consider providing training on the Firm's social media policies and procedures. Accurate records should be kept of the content of this training and the individuals who successfully complete it.

Firms must also design supervision, review and record keeping procedures to ensure compliance with the policies and to capture a record of the communication where necessary. Firms must establish a policy which sets out the steps to be taken in the event of non-compliant use, and should retain records of such steps in the event that they are taken.

Who is Using Social Media?

Finally Firms should control exactly who is using social media for business purposes. Firms should consider limiting the list of permitted users to those who have been trained on the Firm's social media policies and procedures. Firms should also consider limiting or prohibiting individuals who have a history or non-compliance or who have demonstrated a lack of understanding of the policies and procedures from using social media for business purposes.

Conclusion

The power and reach of social media is remarkable and expanding. Its widespread usage make it a powerful business development, marketing and educational tool. Its inherently interactive nature poses unique regulatory compliance issues for Dealer Member Firms. Firms must establish social media policies and procedures that govern the platforms used, the permitted use, the permitted users, and which provide for effective approval, supervision, review and record-keeping in order to comply with their supervisory and regulatory requirements.

Policies and procedures should include:

- Definitions of the different types of regulated content, along with the type of review/supervision required, who will perform the review/supervision, how it will be conducted, how it will be recorded, and what steps are to be taken if the review/supervision uncovers an issue; and
- Approved and prohibited social media platforms, users, uses, and devices.

About the Author

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Kate represented clients in enforcement proceedings before the Investment Industry Regulatory Organization of Canada and the Mutual Fund Dealers Association. Kate also maintains a broad civil litigation practice, working on corporate/commercial, class action, employment, fraud and defamation issues. She has appeared before the Ontario Court of Justice and the Ontario Superior Court, as well as arbitration panels, and administrative and regulatory tribunals and boards including the Health Professions Appeal and Review Board, the College of Physicians and Surgeons of Ontario, and the Ontario Municipal Board.

Kate holds a J.D. from the University of Toronto and an Hons. BSc. in biochemistry from McMaster University. She was called to the Ontario Bar and successfully sat for the New York State Bar Examination in 2008.

¹ US Securities and Exchange Commission National Examination Risk Alert, Volume II, Issue 1, January 4, 2012, "Investment Advisor Use of Social Media", pg. 1

² Canadian Securities Regulators Release 2011 Investor Index, OSC News Release, October 16, 2012, http://www.osc.gov.on.ca/en/NewsEvents_nr_20121016_csa-2012-investor-index.htm, accessed November 27, 2012

³ Raising the Bar, IIROC Annual Report 2011 – 2012, www.iiroc.ca/news/Documents/IIROC_AR_2012_EN.pdf, accessed November 27, 2012

⁴ IIROC has responded to the increasing prevalence of social media. As explained in the Annual Report, "As such, last year we undertook a complete redesign of IIROC's website to make it more accessible, easier to navigate and more-user friendly for all stakeholders. Throughout the year, we conducted extensive internal and external consultations, including focus groups and user testing with investors in Toronto and Montreal. The new IIROC website, launched in both official languages in June 2012, has generated very positive feedback. We continue to proactively monitor user feedback to identify opportunities for future improvements."

⁵ The SEC and the Financial Industry Regulatory Authority ("FINRA") have also issued guidelines or commentary regarding compliant use of social media

⁶ "Guidelines for the Review of Advertisements, Sales Literature, and Correspondence"

⁷ IIROC Notice 11-0349, Guidelines for the review, supervision and retention of advertisements, sales literature and correspondence (the "Notice"), pg. 2

⁸ IIROD Dealer Member Rule 29.7(2)

⁹ Rule 29.7(3)

¹⁰ Rule 29.7(3)

¹¹ Rule 29.7

¹² Static social media content may be considered template advertising¹², in which case, provided that the variability in information is limited to non-material issues, items such as background information, profiles and Facebook wall information may only need to be pre-reviewed and approved once. This does not, of course, relieve Firms from later reviewing and supervising each individual instance of the template advertisement, and from taking steps to address and correct issues in individual instances.

¹³ For example, minor changes, such as changing the name of a Registered Representative or contact information would not require pre-approval. See the Notice, pg. 4

¹⁴ Rule 29.7(2)

¹⁵ Notice, pg. 3

¹⁶ <http://www.finra.org/industry/issues/advertising/p006118>, accessed November 22, 2012

¹⁷ Notice, pg. 5

¹⁸ Notice, pg. 5 - 6

¹⁹ In the Notice, IIROC states, "In the event that interactive content becomes static, for example by posting the real-time interactive content in a static forum such as a blog, this static content must be pre-approved if it is captured under IIROC Dealer Member Rule 29.7".

²⁰ "Liking" involved clicking an icon provided by the platform to indicate approval of the content. The "likers" identity is then stored and usable

²¹ In addition to the brief discussion in this paper, see, for example, the recent commentary on the limitations of the purported privacy protection offered by "Snapchat", a smartphone application which permits users to limit the amount of time a posted photo remains visible to other users of the application.

²² For a detailed discussion of this change and analysis of Facebook's distinction between "privacy" and "visibility", see <http://bits.blogs.nytimes.com/2012/06/26/for-facebook-visibility-is-not-privacy-while-others-disagree/>

²³ Firms may, for example, prohibit social media communication for business purposes via smartphones or personal tablets or laptops.