Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Social Media And The SEC: Investment Advisers Beware

Law360, New York (January 19, 2012, 12:22 PM ET) -- The U.S. Securities and Exchange Commission has charged an investment adviser with offering to sell $500 billion of fictitious securities on LinkedIn.

The adviser, who was charged on Jan. 4, now faces an administrative proceeding before the SEC and may be ordered to pay a civil penalty and/or disgorgement. Indeed, in the immediate wake of its order bringing these proceedings, the SEC issued its first ever alert regarding the use of social media by investment advisers.

Investment advisers who utilize social media to communicate with clients and potential clients must be mindful of the applicable standards governing those communications.

SEC Enforcement Action Against Investment Advisor Anthony Fields

Pursuant to several federal securities laws, the SEC instituted administrative and cease-and-desist proceedings against Anthony Fields on Jan. 4, 2012. The SEC alleges that Fields used various social media sites, including LinkedIn, to offer to buy and sell more than $500 billion of fictitious bank guarantees and medium-term notes.

The order also accuses Fields of (1) failing to adopt or implement written policies and procedures designed to prevent violations of the Investment Advisers Act of 1940; (2) failing to maintain books and records required of registered investment advisers; (3) failing to establish, maintain and enforce a required written code of ethics; and (4) publishing false and materially misleading information on various websites. Fields may be ordered to pay a civil penalty and/or disgorgement.[1]

The very next day, on Jan. 5, 2012, the SEC issued its first ever social media alert.

SEC Alert: "Investment Adviser Use of Social Media"[2]

The SEC's social media alert, entitled "Investment Adviser Use of Social Media," stresses that registered investment advisers and firms' use of social media "must comply with various provisions of the federal securities laws, including, but not limited to, the anti-fraud provisions,[3] compliance provisions[4] and recordkeeping provisions."[5]

The alert focuses on three main issues that advisers employing social media strategies should consider in connection with their obligations under federal securities laws: compliance strategies, third-party postings and record-keeping responsibilities.

Compliance Strategies

First, the SEC alert notes that while advisers may have general compliance programs that could apply to the use of social media, the lack of specificity in such policies and procedures may cause confusion as to what standards actually govern social media use. The alert therefore urges advisers to adopt specific social media use compliance programs and includes a nonexhaustive list of factors for evaluating the effectiveness of such programs.

Third-Party Postings and the "Like" Feature

Second, the alert encourages advisers to implement explicit policies and procedures detailing what types of third-party postings are permissible. Notably, the alert cautions that third-party use of the "like" feature on an adviser's social media site could be deemed to be a testimonial under the Advisers Act if it is an explicit or implicit statement of a client's experience with an investment adviser.

Record-Keeping Provisions

Finally, the alert explains that advisers' records of social media communications must be preserved if they contain information that satisfies recordkeeping obligations under the Advisers Act. Accordingly, the alert urges advisers to review their document retention policies to ensure that any required records generated by social media communications are retained in compliance with the federal securities laws.

How Investment Advisers Can Avoid Violations of Federal Securities Laws

All this emphasizes the need for investment advisers who wish to use social media for business purposes to revisit their existing protocols and ensure they adequately account for their business use of social media.

Written Policies and Procedures

As the SEC alert notes, while many fund advisers have gone to great effort to document, implement and enforce communications policies, those policies do not always address the types of digital communications that have become increasingly popular in recent times. Fund advisers should, therefore, consider whether it is time to update internal policies and whether these policies properly take into account the potential uses of social media.

Social media is about sharing and collaboration. For this reason, the best approach to updating the communications policies may be to bring in the most active social media employees/advisers to collaborate and help craft the firm's social media guidelines. Including employees in the process creates internal advocates for the policy. An effective policy should let everyone within the firm know what they need to know to communicate the firm's message effectively, and what they should and should not do.

Once a new written social media policy is in place, is it time to retrain investors and employees? If so, it is important to let investors and employees know there has been a change to the written policies that each signed when they were hired. An email or memo should be sent to all employees and investors that includes a copy of the new policy or a link to where they can reference the policy. Educating employees and investors on the social media policy will help to curb mishaps.

Continuous Monitoring and Compliance

Social media data is constantly changing. Third parties often have the ability to post and/or make comments. Therefore, effective compliance requires continuous monitoring to ensure that postings on the firm's site do not violate federal securities laws. This process should include a periodic evaluation on the effectiveness of the policies, retraining and monitoring

what was put into place.

Record Retention Policies

You may also need to ask yourself: Is it also necessary to review and update record retention policies to ensure that any required records generated by social media communications are retained in compliance with the federal securities laws? Social media data is ever changing and constantly updated and refreshed. Do record retention policies properly capture these critical nuances unique to social media business practices?

In these challenging economic times, fund advisers should be applauded for their creative efforts to market themselves through social media. In undertaking such efforts, however, investment advisers would be wise to engage experienced outside counsel to review their compliance policies and procedures in connection with all of their social media activities. Doing this now will go a long way toward ensuring that their creative business and marketing efforts are in line with federal law.

--By Perrie Michael Weiner, Joshua Briones, Crystal Lopez and Nicolas Morgan, DLA Piper

Perrie Weiner is a partner in DLA Piper's Los Angeles office, where he is international co-chairman of the firm's securities litigation practice. Joshua Briones is a partner in the firm's Los Angeles office. Crystal Lopez is a member of the firm's litigation group in Phoenix. Nicolas Morgan is a partner in the Los Angeles office, where he is West Coast chairman of the firm's securities enforcement practice.

The opinions expressed are those of the authors and do not necessarily reflect the views of the firm, its clients, or Portfolio Media, publisher of Law360. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] See SEC order at http://www.sec.gov/litigation/admin/2012/33-9291.pdf

[2] See http://www.sec.gov/about/offices/ocie/riskalert-socialmedia.pdf

[3] See, e.g., Section 17(a) of the Securities Act of 1933, 15 U.S.C. §77q(a), Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b), and Rule 10b-5 thereunder, 17 C.F.R. §240.10b-5, and Sections 206(1), 206(2), and 206(4) of the Advisers Act, 15 U.S.C. §§806-6(2), 806-6(4), and Rule 206(4)-1 thereunder, 17 C.F.R. §206(4)-1

[4] See, e.g., Section 206(4) of the Advisers Act, 15 U.S.C. § 806-6(4), and Rule 206(4)-7 thereunder, 17 C.F.R. §206(4)-7.

[5] See, e.g., Section 204 of the Advisers Act, 15 U.S.C. § 804, and Rule 204(2) thereunder, 17 C.F.R. §204(2).