

**PART I**

# **Introduction to Social Media**

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## CHAPTER 1

# Compliance

Crystal Thies

Yes, that's where we're starting, and I feel very strongly about starting here. I was reading a *Wall Street Journal* (WSJ) blog article by Josh Brown, who was making fun of the concept of "financial social media experts," and I knew we had to address this issue first to prove that there is such a thing and that we *are* qualified.

Now, Matt's a little more timid in this space because as a financial practice coach, he's mostly been on the sidelines of the compliance war. I, however, have fought several compliance battles and reigned victorious! By victorious, I mean I ended up with a marketing piece that did work, but that was not necessarily my original glorious vision. Of course, that was after many rounds of back and forth editing and negotiating the use of adjectives.

To this day, it's still hard for me to not see a compliance officer as the enemy—at least until the next securities fraud story hits the news. We have to remember that in the terms of history, Bernie Madoff just happened. And, in terms of securities fraud, that's the biggest name since Charles Ponzi. We like to think that financial services and securities has become a better, more ethical profession. Unfortunately, it only takes one person to spoil it for everyone. I can only imagine what could have happened if Bernie hadn't gotten caught when he did and had gotten his hands on social media! How many other people and organizations would have lost their money?

So, as much as they frustrate the heck out of me, we do need our compliance officers. It's taken some time, but I believe that most financial advisors will be seeing their companies opening up to social media in 2012. That's

because two things are happening. First, the broker-dealers are realizing that they are losing out on business by not participating in the *conversation*. Second, technology has finally caught up and there are affordable solutions to properly and legally archive the activity.

I'm going to be completely honest with you. As a practicing financial planner, I did not follow my broker-dealers' marketing and communications policies 100 percent of the time. I did knowingly do things that were not allowed. I also took advantage of gray areas where you knew that the broker-dealer likely meant one thing, but the way it was written was ambiguous and an argument could be made that what I was doing was allowed.

I bet that's not a complete shock to most of you. One of the most interesting things I found when I returned to financial planning in 2008 after being out of the industry for just under a decade was that not much had changed in the helpful advice offered by experienced advisors in my office. Many experienced financial advisors would confide that if you wanted to succeed, you had to bend some compliance rules. Not lie, not deceive, and not break the law—just bend some of the rules.

Now, I'm sharing that with you because I want you to know that I've been in your shoes and I understand your frustration. However, as you will read in the next section, I'm not advocating bending or breaking your broker-dealers' or firms' compliance policies in regard to social media going forward due to some very important changes. Besides which, I was wrong to do it in the first place and so were the others.

## **Compliance and FINRA Licensed Advisors**

The vast majority of broker-dealer compliance policies are much stricter than the law established by the Financial Industry Regulatory Authority (FINRA). So, it is not difficult to bend and even break some of their rules without breaking the law. You're risking losing your contract, but not going to jail. In the past, I have worked with some of those advisors who were more interested in playing in the gray areas of their compliance policies in regard to social media, but I've changed my tune since August 2011, when FINRA released Regulatory Notice 11-39 Guidance on Social Networking Websites and Business Communications ([www.finra.org/Industry/Regulation/Notices/2011/P124187](http://www.finra.org/Industry/Regulation/Notices/2011/P124187)).

Regulatory Notice 11-39 clearly states that if your broker-dealer says that you cannot use social media for business purposes, then you cannot use

social media for business purposes. They've removed the gray; we're in black and white territory now.

As part of this responsibility, a registered principal must review prior to use any social media site that an associated person intends to employ for a business purpose. The registered principal may approve use of the site for a business purpose only if the registered principal has determined that the associated person can and will comply with all applicable FINRA rules, the federal securities laws, including recordkeeping requirements, and any additional requirements established by the firm.

However, another important point that has come out of Regulatory Notice 11-39 is that whether or not the social media communication is personal or business is not determined by the device used (meaning that you can't go home and use your home computer or use your smart phone to send out financial-services-related status updates and messages and call it personal), but by the actual content in the communication.

SEA Rule 17a-4(b)(4) requires a firm to retain records of communications that relate to its "business as such." Whether a particular communication is related to the business of the firm depends upon the facts and circumstances. This analysis does not depend upon the type of device or technology used to transmit the communication, nor does it depend upon whether it is a firm-issued or personal device of the individual; rather, the content of the communication is determinative.

Therefore, only social media activity that is clearly business related must be supervised and archived. If you're mixing the two, then chances are that all will be reviewed and archived, so make certain you're comfortable having your manager reading the personal social media activity. I say that because 11-39 also states that if it is cost prohibitive, your broker-dealer can treat all communication on a device used for business communication as business communication—*no matter who owns the device*.

FINRA Rule 2210 ("Communications with the Public") is currently in process of being approved and should be approved by the final printing of this book. Full compliance and implementation of the new rules will be required sometime around March/April 2013.

FINRA Rule 2210 clarifies where social media falls in relation to other communications of regulated firms. At this point, posts in "online interactive electronic forums" (i.e., social media) are considered "public appearances"

that do not require pre-approval, but do require filing and archiving. 2210 does away with the category “public appearances” and recategorizes such activities as “retail communications.” The new “retail communications” category will not require pre-approval (accept for very specific types of communications) and will require oversight, monitoring, and archiving. 2210 also specifically exempts content in “online interactive electronic forums” from pre-approval. Therefore, tweets, status updates, comments, group postings, etc. in Facebook, Twitter, and LinkedIn will not require pre-approval simply because they are on an “online interactive electronic forum.” However, the static profiles will require pre-approval as they will continue to be categorized as advertising content.

One final, important clarification from FINRA Rule 2210 is that retail communications that do not make any financial or investment recommendation or otherwise promote a product or service of the member, irrespective of the number of recipients, also is exempt from pre-approval. This also tells us that anything that *is* recommending or promoting a product or service — regardless if the communication will be on social media or not — will likely still require pre-approval. Therefore, if the content you’re planning on sharing on Facebook, Twitter, or LinkedIn is promoting your services as a financial advisor or something like a seminar that you’re presenting that is meant to generate new clients, then that type of social media content will still need to be pre-approved. If it’s an event you will be hosting, then pre-compose and submit the promotional status updates with the rest of the material you will already be submitting to compliance for pre-approval. If you’re planning on regularly encouraging people to sign up for your newsletter or come in for a complimentary consultation, then put all of those status updates together and get them pre-approved. Once approved, you’ll be able to re-use them as long as you make no changes to them.

We are still in the commenting phase on one last amendment to the new proposed rule, however, the bulk of 2210 has been well vetted and commented on and will likely be passed in its current state.

## **Compliance and SEC Licensed Advisors**

For those of you out there who are only registered investment advisors (RIA) and not a hybrid with dual licensure with FINRA, you may be wondering what the hullabaloo is all about because you may have been using social

media for quite some time now. In fact, I would hazard a guess that the majority of financial advisors who have been active in social media thus far are RIA. You haven't had someone telling you, "No!" because you're the person who is supposed to be telling you, "No!"

Actually, it's all right if you've been saying, "Yes," to social media if you've been doing everything that you're supposed to be doing when you say, "Yes." Unfortunately, the Securities and Exchange Commission (SEC) has recently learned that proper policies and procedures are often not in place for effective approval, monitoring, and preserving of social media usage in RIA firms of all sizes—solo practitioners and RIAs with many investment advisory representatives (IAR).

Therefore, *go no further* until you have put your policies, procedures, and archiving service in place that specifically address the use of social media by you, your IARs, and administrative staff. You can find the details of their concerns in the National Examination Risk Alert entitled, "Investment Advisor Use of Social Media" (Volume II, Issue 1, 1/4/12).

Of additional note in that Alert is their interpretation of the *Like* buttons used on websites and in social media. Depending on the facts and circumstances of what could potentially be liked on Facebook or on LinkedIn, it could be deemed a client testimonial, which we all know is prohibited by the Advisors Act.

## Testimonials

Whether a third-party statement is a testimonial depends upon all of the facts and circumstances relating to the statement. The term *testimonial* is not defined in Rule 206(4)-1(a)(1), but SEC staff consistently interprets that term to include a statement of a client experience with, or endorsement of, an investment advisor. Therefore, the staff believes that, depending on the facts and circumstances, the use of *social plug-ins* such as the *Like* button could be a testimonial under the Advisors Act. Third-party use of the like feature on an investment advisor's social media site could be deemed to be a testimonial if it is an explicit or implicit statement of a client or clients' experience with an investment advisor or IAR. If, for example, the public is invited to like an IAR'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).

Therefore, you will need to be more careful about what you include in a status update on Facebook and LinkedIn since your networks currently have

the capability to click on *Like* of the status update without any control by you. Additionally, you will want to be careful of the website pages on which you use the Facebook Like plugin if you choose to use it. Specifically, keep it off any pages with biographies since that's the example the SEC used!

### **What Should I Do if I'm Not Allowed to Use Social Media?**

As I said in the discussion on FINRA's latest regulatory notice on social media, your social media activities are only required to be supervised if they are business related. It is possible to take a 100 percent personal approach in engaging on social media and get business benefits from it. However, there are very fine lines that you will have to watch and be careful not to cross if you venture down this path.

So, what does this mean? My interpretation is that if you identify yourself as a licensed and practicing financial advisor affiliated with your broker-dealer or DBA on your social media profiles, then that is advertising content requiring pre-approval from your broker-dealer. Any status updates, shared content, messaging, and discussions in groups or forums regarding financial topics would be business related communications. Any content that is not financial in nature and not directly business development for your financial advisory practice is non-business related. Bottom line: Sharing content about any financial topics is out.

What makes social networks so powerful is the ability to build and strengthen relationships. Once the relationship is created, then you can take business-related communications and activity away from the social network and use approved and authorized channels to actually communicate. Establishing a connection is the first part of the battle. Growing the relationship is the second, and converting the relationship to a client is the third. Just because your broker-dealer isn't allowing you to do the second and third on social media doesn't mean that the ability to do the first isn't valuable. And, to be honest, the freedom that you have by not being allowed to talk business on social networks could potentially be more beneficial because none of your activities are limited and the relationships you build may be stronger because the new people you're interacting with may feel like you have no ulterior motives.

## How Does This Work?

It starts with building profiles that don't reference your current financial advisory practice. This is very easy to do with Facebook and Twitter. It's not so easy to do with LinkedIn. I've seen three successful methods of LinkedIn profile building without identifying yourself and your business.

First Method: Simply identify yourself as a *financial services professional* or *financial professional* working at an *undisclosed company* or *self-employed*. Because not all financial occupations require licensing and regulation, that should be generic enough; however if it isn't, then you can also call yourself a *business owner*. Additionally, in the summary or in your position description, mention that your current company and regulatory agency does not allow you to use social networking for advertising and business development purposes and that if someone is interested in learning more about your occupation or business they should send you their contact information and you will contact them through approved business-related channels.

Second Method: If you are involved in a leadership position in a non-profit or community organization that you are committed to, then use your profile to benefit them. List your leadership position as your current position. Then, in the summary section discuss your passion for that mission and your use of a social network profile to benefit their cause instead of promoting your business. If people are interested in learning more about your business, let them know you would be happy to discuss it in another forum.

Third Method: Use another declared business as the basis of your profile and interactions. I have a client who is both a financial advisor and a sales coach. Both are established, legal, and declared businesses. His profiles are all about his sales coaching business. His interactions in groups and status updates are all about helping others become better sales people. Once he's built the relationship, he'll mention to people that he is also a financial advisor. What this has allowed him to do is build a great niche client base of sales professionals and small business owners who saw his expertise in another field and made the leap in thinking that he was likely to be as effective in his main area of expertise—financial planning.

The second part of the non-business-related strategy is focusing on building a solid network of people who are willing to help you. Building that network is what is most important. Once you're connected to them, then

you have other contact information you can use to communicate with the connections regarding business-related matters through approved channels. Now, I don't recommend that financial advisors be open networkers to find and connect with people just to be able to cold call them. We'll talk more about effective network building in another section. However, connecting with everyone you meet and have a significant interaction with is definitely the way to go.

The third part of the non-business-related strategy is to use this opportunity to promote and connect the people within your network to the rest of your network to help them with their businesses. Since you can't talk about your business, you're going to need *something* to talk about. Promoting your network, their businesses, and business activities gives you great content that is not self-serving. Additionally, the people in your network are going to be enormously grateful and much more likely to help you with your business through referrals and unsolicited third-party promotion (as long as it's not a static recommendation on your profile about your financial advisory practice). If someone decides to do a spontaneous status update on their profile that will disappear in two weeks about what a great financial advisor you are, then there are no compliance issues as long as you *don't* interact with it. Then, the hope is that some of the shared connections in your network see it, jump on the bandwagon by commenting or liking it, and *whoosh!*—social media works! Huge, viral, temporary, visibility that you weren't involved in, can't control, and can't get rid of until it completes its life cycle or the owner removes it.

The last part of the strategy is to build yourself up as an expert in a non-financial topic that correlates to the expertise you have as a financial advisor or that appeals to the target market you want for your financial advisory practice. That's what my sales coach/financial advisor client did. Another similar topic would be small business ownership (the nonfinancial stuff, of which there is a lot!). Topics of interest to your target market could be as simple as your passion for wine or other interests that may appeal to a wealthier market, or volunteerism that would appeal to those charitably inclined as well as the nonprofits themselves that could be referral sources. It just comes down to knowing your target market.

My final suggestion if you should decide to go the non-business-related social network strategy route (whether you're not allowed to use social media by your broker-dealer or you choose not to in order to not deal with the headache), is to personally invest in an archiving system. Even though you're

not discussing business-related stuff, the only way to prove it is to preserve it. A few of the archiving platforms do have individual level accounts that are cost effective (Erado and Arkovi come to mind). These will record all of your social media activity and communications no matter which device you use and are a safety net you cannot afford to go without.

## Final Thoughts

Before you go any further, pull out your latest compliance policy on the use of social media. Read through it and if you have any questions about what is meant by anything that appears to be ambiguous, ask your compliance officer to explain what is meant.

I would also recommend reviewing the regulatory notices on social media put out by FINRA and the SEC (depending on which are applicable to you). Although accurate at the time of writing, both FINRA and the SEC are working on more definitive guidelines so that less is up to interpretation. Hopefully, some more of those guidelines have come out by the time you're reading this book. If they have, then our understanding and interpretation may no longer be relevant.

If your policy is still very restrictive, inquire as to the broker-dealer's or firm's intentions and plans with social media. Take a proactive approach and let them know that your use of social media can only benefit them because you're committed to using it responsibly. The vast majority of financial advisors are independent contractors. Adding your broker-dealer's branding to your social media helps them more than it may help you (unless you're operating under your own DBA). They should want it there.

As you read through the book, we will address compliance issues and considerations from time to time. When we can, we will point out areas where there may be different interpretations and approaches by broker-dealers and RIA firms so that you know to take a closer look before taking action. While we strive to be as thorough as possible, only you can have access to your policy and only you are responsible for acting appropriately within that policy. Not every suggested strategy and approach will be deemed acceptable use by every compliance policy; however, our understanding and interpretation is that they do meet the guidelines established by the FINRA, the SEC, or both. This book is written for both solo RIAs and Registered Representatives of broker-dealers. Instead of going with what can be done by the lowest common denominator to

be super safe, some of our strategies are designed for and can only be used by the highly ethical independent advisors who are following through with good policy management and recording of their social media activity. Because they fully own the liability of their actions they are able to use the social media tools to their full ability within the limits of the law. We realize that the vast majority of the readers are not in this category, however, we want to demonstrate what is truly possible.

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