

PUBLICATION

SEC Division of Investment Management Provides Guidance on the Testimonial Rule and Social Media

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The Division of Investment Management (the Division) of the Securities and Exchange Commission recently issued guidance (the Guidance) to investment advisers regarding the applicability to social media of Rule 206(4)-1(a)(1) (the Rule) under the Investment Advisers Act of 1940, as amended, which generally bans the use of testimonial advertisements. In the Guidance, the staff of the Division provided a series of Q&As outlining when investment advisers and investment adviser representatives are permitted to use social media and publish public commentary about the adviser from third party social media sites on an adviser's own site.

Background

The Rule was adopted to prevent misleading testimonial advertisements, which by their nature would emphasize clients' experiences favorable to the adviser and ignore unfavorable experiences. Such testimonial advertising could lead to a fraudulent impression that the experience in the testimonial is typical of the adviser's clients. Whether a statement is testimonial is a "facts and circumstances" analysis, and SEC staff has indicated that a testimonial would include statements regarding a client's experience or 'endorsement of an adviser. Given the rise of social media and clients' use of social media regarding investment advisers, questions have arisen regarding how investment advisers may interact with independent social media sites that may include comments that could be viewed as "testimonial." The Guidance provides Q&As from the Division that attempt to address these issues.

Guidance Highlights

The Guidance gave the Division staff's views on the following areas:

Publishing Public Comments from an Independent Social Media Site. An investment adviser may publish all the public comments about the adviser from an independent social media site on the adviser's own social media site or website, subject to certain conditions.¹ First, the adviser must post all of the comments from the independent social media site in a *content-neutral* way (such as chronological) and may not emphasize certain comments above others. Second, the adviser must have *no ability to control which* public commentary is included on the independent site, and the site must allow for the viewing of all comments and the updating of comments on a real-time basis. Third, there can be *no material connection* between the independent social media site and the investment adviser. Finally, the adviser *cannot author* its own commentary (either under its own name or anonymously) on the independent site, be able to *edit or prioritize* the commentary, or be able to *suppress* any commentary in whole or in part.

Advertising on Independent Social Media Sites. An adviser could publish public commentary from an independent site even if the site features advertising from the adviser. However, the adviser must comply with the independent factors in the Guidance and the advertisement must be easily recognizable as a sponsored statement.

References to Independent Social Media Commentary on Non-Social Media Advertising. An investment adviser could reference public commentary on an independent social media site in its non-social media

advertising. For example, the Guidance states that a newspaper ad with the statement "see us on [independent social media site]" would be permissible. However, to quote a particular comment from an independent social media site in an adviser's non-social media advertising would be considered an impermissible testimonial under the Rule.

Client Lists. Under the Guidance, a list of "friends" or "contacts" on an adviser's social media site would not be considered testimonial, provided that the adviser does not attempt to create the inference that such "friends" have experienced favorable results from the adviser.

Fan Pages. Finally, the Guidance provides that a third party's creation of an unconnected fan page would generally not implicate the Rule. However, the Guidance cautions advisers from publishing content from or driving traffic to such sites, particularly if they do not meet the independence standards in the Guidance.

Conclusion

Investment advisers should review the Guidance. Investment advisers should also review their use of social media and their policies and procedures regarding social media to ensure they are consistent with the Guidance. Please contact us at Baker Donelson if you have questions regarding the Guidance or your firm's use of social media.

¹ A site would not be independent if the investment adviser compensated a social media user for writing commentary or prioritized, removed or edited the commentary. Also, an investment adviser could not have a supervised person of the adviser post commentary on an independent social media site.