

The top half of the slide features a dark blue background with a glowing, digital aesthetic. A red square in the top left corner contains the text 'K&L GATES' in white. Below this, a series of vertical bars of varying heights, colored in a gradient from dark blue to light blue, are overlaid with a red line graph. The background is also filled with horizontal bands of glowing blue light and binary code (0s and 1s) in a light blue color.

K&L GATES

2017 WASHINGTON D.C. INVESTMENT MANAGEMENT
CONFERENCE

Advertising and Social Media for Mutual Funds

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Mutual Fund Advertising Regulation

David R. McCandless

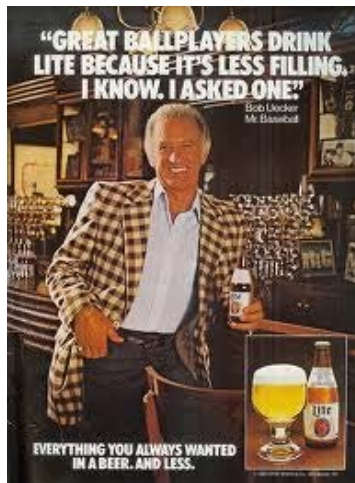
EXAMPLES OF “REAL” ADVERTISING



Demonstrating
Product
(Infomercials)



Building Image



Changing
Perceptions



EXAMPLE OF A TYPICAL MUTUAL FUND ADVERTISEMENT

This ad is not an offer to sell nor
solicitation of
an offer to purchase.

The offer is only made
by the prospectus.

ABC Fund

Copies of the prospectus
may be obtained by calling
800-555-1212 or by
going to abcfund.com

*Past performance is not indicative of
future results*

Q: WHY IS MUTUAL FUND ADVERTISING SO DIFFERENT FROM REGULAR ADVERTISING?

A: Securities Regulation



SEC REGULATION

- Section 5 of 1933 Act: Limitations in Advertising
- Omitting Prospectus – Rule 482
 - Standardized Performance Disclosures
 - Money Market Fund Disclosures
 - Prominence and Disclaimer Requirements
- Supplemental Sales Materials – Rule 34b-1
- Generic Advertising – Rule 135a
- Advertising Standards – Rule 156
- Profile/Summary (Short form prospectus)



USE OF RELATED PERFORMANCE IN ADVERTISING

- SEC No-Action Letters and required conditions for use
- FINRA ban on use



FINRA REGULATION AND REVIEW

- NASD/FINRA Rules
- FINRA Advertising Review Rules
- General FINRA Standards – Rule 2210
 - Consolidation / Reorganization of rules about communication with the public



EXAMPLES OF NON-COMPLIANT ADVERTISEMENTS

The following slides include examples of advertisements that are non-compliant for the following reasons:

1. Includes Promissory Language
2. Includes Misleading Images
3. Inappropriate Presentation and Proximity of Performance Information
4. Problematic Graphics

Can you guess which number goes with which slide?



EXAMPLE A

ROYAL CLIPPER SMALL CAP FUND

The Royal Clipper Small Cap Fund seeks to achieve its investment objective by investing at least 80% of its net assets in the equity securities of smaller companies with market capitalizations at the time of investment between \$400 million and \$1.5 billion.



*Past performance is not indicative of
future results*



EXAMPLE B



Are you ready to maximize your returns? Are you ready to invest with peace of mind? Then invest in the Royal Clipper Extraordinary Returns Fund.

Royal Clipper Extraordinary Returns Fund =
Guaranteed Returns.



EXAMPLE C

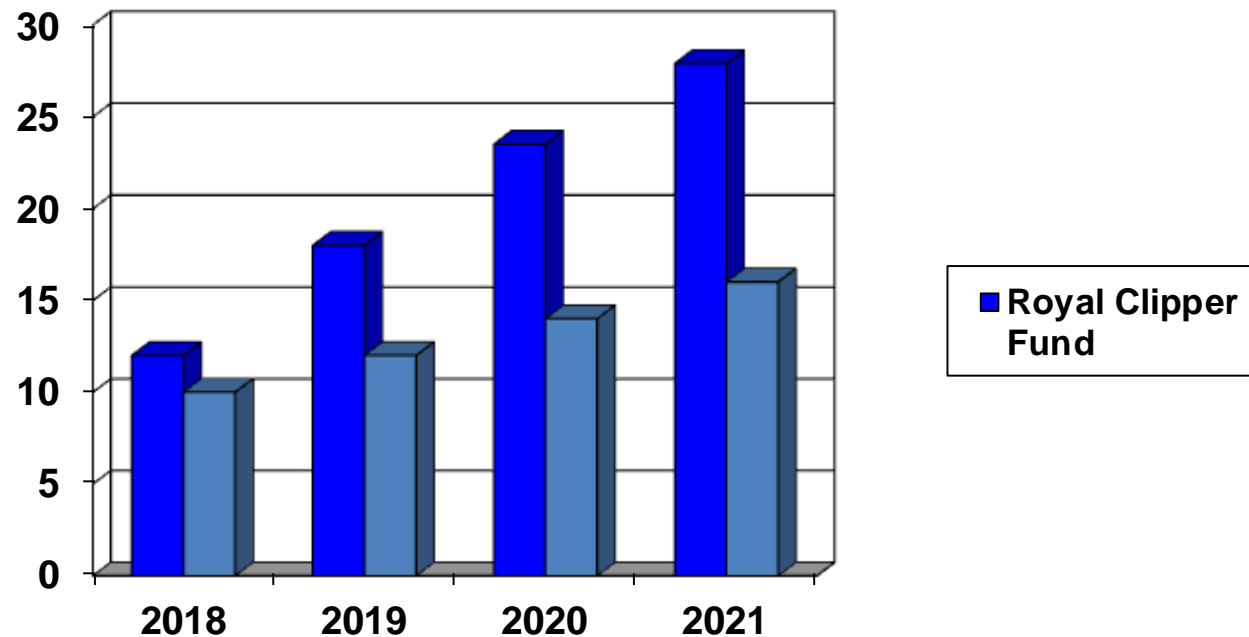
PERFORMANCE TABLE	
Royal Clipper Top Notch Fund -10.0%	Benchmark Index - 9.2%

The equity market performed well during the first half of this year and positive security selection in the Industrials and Financials sectors benefited the performance of the Royal Clipper Top Notch Fund as compared to its benchmark. Looking ahead, the Fund remains overweight in both of these sectors as they will certainly perform exceptionally.

The performance data quoted represents past performance of the Fund's primary class and does not guarantee future results. Current performance may be lower or higher than the performance data quoted. To obtain the most recent performance data or the prospectus for the Fund, please call 1-800-555-5555.

EXAMPLE D

ROYAL CLIPPER'S LARGE CAP FUND (projected performance)



ROYAL CLIPPER AWESOME COMMODITIES FUND

Goal: Guaranteed Returns.

PERFORMANCE TABLE	
Royal Clipper Awesome Commodities Aggressive Growth Fund - 25.6%	MCSI China Index - 9.2%

The Royal Clipper Awesome Commodities Aggressive Growth Fund always achieves its investment objective by investing in commodity-linked instruments and fixed income instruments or equity securities of smaller companies.

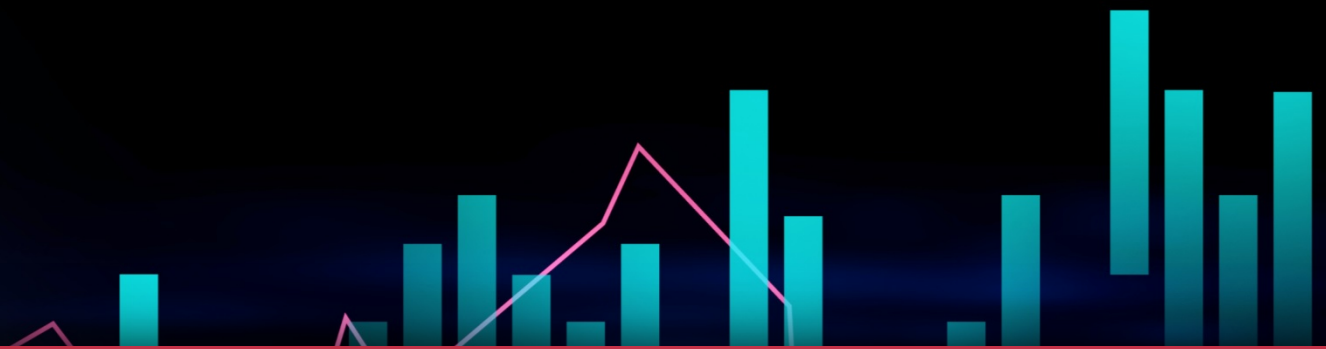
The team at Royal Clipper Awesome Commodities Fund made me a ton of money last year!

- K.L. Gates, current investor

- Ideal investment to maximize returns with zero risk.
- Risk? What risk?
- We will generate at least 15% total return this year.
- Ranks first against comparable funds!



- The performance data quoted represents past performance of the Fund's primary class and does not guarantee future results. Current performance may be lower or higher than the performance data quoted. To obtain the most recent performance data or the prospectus for the Fund, please call 1-800-555-5555.



Regulation of Social Media Use by Asset Managers



THE USE OF SOCIAL MEDIA BY ASSET MANAGERS

- I. What is Social Media and Why is it Important?
- II. Legal Framework and Regulatory Guidance
- III. Third-Party Posts and Content
- IV. Drafting Social Media Policies



The background of the slide features a dark blue gradient. At the top, there is a bar chart with teal-colored bars of varying heights. A red line graph is overlaid on the bars, showing a fluctuating trend. Below the chart, a solid red horizontal band contains the main text. At the bottom of the slide, there are several horizontal lines of glowing blue binary code (0s and 1s) that appear to be floating or scrolling.

WHAT IS SOCIAL MEDIA? WHY IS IT IMPORTANT?

WHAT IS SOCIAL MEDIA?

“Social Media is an umbrella term that encompasses various activities that integrate technology, social interaction and content creation. Social media may use many technologies, including, but not limited to, blogs, microblogs, wikis, photos and video sharing, podcasts, social networking and virtual worlds.”


SEC National Exam Risk Alert (January 4, 2012)



COMMON USES OF SOCIAL MEDIA:

- Marketing
- Expanding brand awareness
- Promoting firm's website
- Building customer loyalty
- Connecting with clients and potential clients
- Educating clients/potential clients
- Servicing clients
- Customer/market research
- Identifying contacts within clients





Winterfell Management

@WinterIsComing


Winterfell Management is an investment management firm with an unyielding focus on helping investors achieve their long-term goals.

[Follow](#)
338 TWEETS
101 FOLLOWING
1,381,681 FOLLOWERS

Follow @WinterIsComing


Sign up

Tweets

 All / No regions




@WinterIsComing
Call us to learn more about our financial products!



@WinterIsComing
When it comes to investment advice, there's no substitute for our personal service.



@WinterIsComing
Thinking about a student loan? Go to our website for some helpful tips.



@WinterIsComing
At Winterfell Management, we strive to meet our clients' needs every day.

Tweets

Following

Followers


Favorites

Lists

Recent images



facebook Search




Winterfell Management

128,877 likes · 1,507 talking about this

Bank/Financial Institution

A Prospectus is available at
<http://winteriscoming.com>.

About – Suggest an Edit

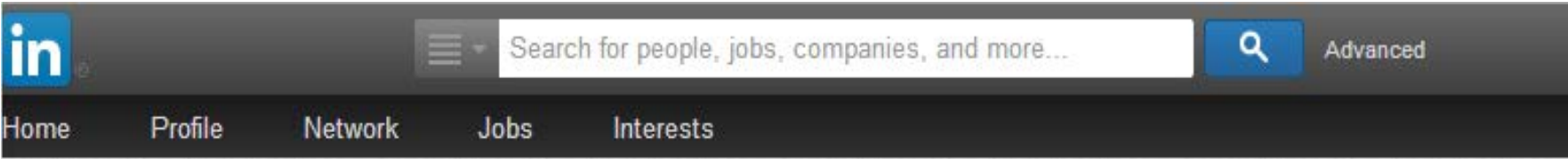


Photos

Likes

128k





Daenerys Targaryen
Portfolio Manager / DragonFire Growth Fund

Dragonstone
Current: DragonFire Growth Fund
Previous: Meereen Advisors LLC





LEGAL FRAMEWORK AND REGULATORY GUIDANCE



CHANGING LANDSCAPES: APPLYING OLD STANDARDS TO NEW TECHNOLOGY

“Social Media is landscape-shifting. It converts the traditional two-party, adviser-to-client communication into an interactive, multi-party dialogue among advisers, clients, prospects, within an open architecture accessible to third-party observers. It also converts a static medium, such as a website, where viewers passively receive content, into a medium where users actively create content.”

OCIE National Examination Risk Alert,
Investment Adviser Use of Social Media
(January 2012)



REGULATORY FRAMEWORK FOR INVESTMENT ADVISERS, BROKER-DEALERS AND PRIVATE FUNDS

- **Anti-Fraud Provisions:**

- Section 206 of the Investment Advisers Act (“Advisers Act”), Section 17(a) of the Securities Act of 1933 (“Securities Act”), Section 10(b) and Rule 10b-5 under the Securities Exchange Act of 1934 (“Exchange Act”), Section 34(b) of the Investment Company Act (“1940 Act”), FINRA Rule 2210, CFTC Regulation 180.1, NFA Compliance Rules 2-29 and 2-36

- **Advertising Rules:**

- **Advisers Act Rule 206(4)-1, FINRA Rule 2210**, Securities Act Rules 482 and 156, 1940 Act Rule 34b-1, CFTC Regulation 4.41, NFA Compliance Rules 2-29 and 2-36

- **Compliance/Supervision Rules:**

- Advisers Act Rule 206(4)-7, 1940 Act Rule 38a-1, FINRA Rules 3110 and 3120, CFTC Regulation 23.602, NFA Compliance Rules 2-29 and 2-36

- **Recordkeeping Rules:**

- **Advisers Act Rule 204-2**, Exchange Act Rules 17a-3 and 17a-4, FINRA Rules 2210 and 4511, FINRA Regulatory Notice 17-18, Section 31 and 1940 Act Rule 31a-2, CFTC Regulations 1.31, 4.7(b), 4.12, 4.23 and 4.33, NFA Compliance Rules 2-29 and 2-36

- **Suitability:**

- **FINRA Rules 2111 and 2114**



INVESTMENT ADVISER ADVERTISING REGULATIONS

- Advertising is any written communication addressed to more than one person or any notice or announcement in any publication or by radio or television which offers any analysis, report or publication regarding securities; any graph, chart, formula or other device for making securities decisions; or any other investment advisory services regarding securities
 - May include emails, websites or social media posts
- Investment advisers are prohibited from using advertisements that contain “**untrue statements of material fact**” or are “**otherwise misleading**”

Advisers Act Rule 206(4)-1



INVESTMENT ADVISER ADVERTISING REGULATIONS

- Investment advisers are generally prohibited from publishing, distributing or circulating advertisements with:
 - Testimonials
 - Past specific recommendations
 - Graphs, charts and formulas
 - Free reports and services
 - Untrue statements of material fact

Advisers Act Rule 206(4)-1



INVESTMENT ADVISER ADVERTISING REGULATIONS: SEC GUIDANCE FOR SOCIAL MEDIA

- Social media is subject to the same advertising rules as “normal advertising”, including recordkeeping and production requirements
- Firms may be responsible for third-party content
- Firms should:
 - Identify risk exposure given their operations
 - test if their compliance policies and procedures effectively address risks

OCIE National Examination Risk Alert,
Investment Adviser Use of Social Media
(January 2012)



INVESTMENT ADVISER ADVERTISING REGULATIONS: SEC GUIDANCE FOR SOCIAL MEDIA

- Rule 204-2 and Recordkeeping:
 - Records relating to a firm's "advisory business" must be kept
 - If records are kept in electronic format, must be arranged and indexed to promote easy access
 - Conduct employee training regarding required records and periodically test to make sure employees are not destroying required records
 - Consider use of third-party vendors to keep records

OCIE National Examination Risk Alert,
Investment Adviser Use of Social Media
(January 2012)



INVESTMENT ADVISER ADVERTISING REGULATIONS: SEC GUIDANCE FOR SOCIAL MEDIA

- Certain interactive content is not required to be filed under Section 24(b) of the 1940 Act or Rule 497 under the Securities Act
- Look at “content, context, and presentation of the particular communication or set of communications”
 - *i.e.* a Twitter retweet vs. a Facebook “like”
- Examine “the underlying substantive information transmitted”
- Is it a response to a request or inquiry from a social media user or is it forwarding previously-filed content?

IM Guidance Update,
Filing Requirements for Certain Electronic Communications,
March 2013



INVESTMENT ADVISER ADVERTISING REGULATIONS: FORM ADV SOCIAL MEDIA REPORTING

- Amendments to Form ADV now require an adviser to disclose social media platforms in addition to websites on Schedule D
- Disclosure is limited solely with respect to accounts on publicly available social media platforms where the adviser controls the content and the social media platform is used to promote the business of the SEC-registered adviser
- An account on a social media platform used solely to promote the business of a registered adviser's unregistered affiliate is not required to be disclosed
- “[O]ur staff may use this information to help prepare for examinations of investment advisers and compare information that advisers disseminate across different social media platforms”

SEC Release No. IA-4509, August 25, 2016

FINRA GUIDANCE

- **Key Topics:** Recordkeeping, Suitability, Supervision, Third-party posts
- FINRA Regulatory Notice 17-18 (April 2017): Guidance on Social Networking Websites and Business Communications
- Targeted Examination Letter, June 2013 Re: Spot-Check of Social Media Communications
- FINRA Regulatory Notice 11-39 (Aug. 2011) – *Social Media Websites and the Use of Personal Devices for Business Communications*
- FINRA Regulatory Notice 10-06 (Jan. 2010) – *Guidance on Blogs and Social Networking Web Sites*
- FINRA Regulatory Notice 07-59 (Dec. 2007) – *Supervision of Electronic Communications*



RECORDKEEPING

- Ensure first that you can retain records before allowing social media use.
 - Apps and text messages are “records” that require retention.
 - (FINRA Regulatory Notice 17-18 (April 2017)).
- Content of the communication is determinative – must retain communications sent or received by firm or its associated persons that relate to broker-dealer’s “business as such.”
- Does not matter if employee sends a communication using a “personal” device – still subject to business as such standard.
- Includes third-party posts – rules require retention of records of communications received by firm or its associated persons relating to its business as such.



SUITABILITY (FINRA RULE 2111)

- Recommending a specific investment product or investment strategy in a social media post can trigger “suitability” requirements
- Broker must “have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer”
 - This belief must be based on “reasonable diligence of the member or associated person to ascertain the customer’s investment profile”
- Best practice to require pre-approval by a registered principal of any recommendations of a specific investment product or investment strategy
- Some firms prohibit references to specific investment products or strategies due to these issues



Prior Approval vs. Supervision (FINRA Rule 2210)

Static Communications

- Social Media Profiles
- Blogs
- Message Boards
- Retail communications require pre-approval by a registered principal

Interactive Communications

- Comments
- Status Updates
- Retail communications may not require pre-approval
- May become static communications if reposted, thus triggering the pre-approval requirement

Recordkeeping requirement apply equally to both types of communications (Retail communications are those made available to more than 25 people).





THIRD-PARTY POSTS AND CONTENT

TESTIMONIALS AND ENDORSEMENTS

- Include an explicit or implicit statement of a client's experience with, or endorsement of, an investment adviser
- Prohibited under Rule 206(4)-1 under the Advisers Act because they may suggest that all of the adviser's clients or investors have the same favorable experience as described in the testimonial
- Social "plug-ins," Facebook Likes and LinkedIn Recommendations could be testimonials depending on facts and circumstances (OCIE National Examination Risk Alert, Investment Adviser Use of Social Media (January 2012))

ADOPTION AND ENTANGLEMENT THEORIES

- Advisers are responsible for the content that they or their representatives put on their webpage
- An adviser may also be responsible for content that it did not author if:
 - The adviser had some responsibility for its creation (**entanglement**)
 - The adviser has somehow endorsed it (**adoption**) after the content was created



ADOPTION AND ENTANGLEMENT THEORIES

Examples of Entanglement:

- A firm pays for an industry study
- Soliciting a recommendation on LinkedIn
- A firm employee posts a review of the firm

Examples of Adoption:

- Selectively removing content, such as unfavorable material
- “Retweeting” a post from a third party





Winterfell Management

STATIC

The section should have been:

- Reviewed and approved by a principal
- Filed within 10 days of first use

13,008 followers

Unwarranted as no basis provided.

peers

Interested in jobs at Asteroid?

Unwarranted and promissory.

See Jobs >

About Us

Asteroid Financial Services, Inc. was founded in 1993 and has over 20 solid years of investment management experience. Asteroid and its affiliates provide clients with an array of investment strategies and solutions. From our cutting edge suite of mutual funds that have provided investors with consistent and profitable returns to ETFs, bonds, non-traded REITs, and private placements, Asteroid is your one stop shop for ALL your investment needs!!!

Website
www.asteroidfin.com

Industry
Investment Management

Type
Public

Employees

Exaggerated.



See connections >

Recent Posts

Asteroid Check out our family of top of the line mutual funds. Specifically, our New Value Opportunity Fund – which has outperformed! www.asteroidfin.com/home/ValueOpp

Like Comment Share 21 hours ago

Reference is unwarranted and misleading as the Fund only outperformed benchmark for YTD and YTD is negative.

ement.

INTERACTIVE

Taken from handout at FINRA Conference



Winterfell Management

Asteroid Have you seen our latest blog post? Investing for a happy retirement.
www.asteroidfinn.com/blog



**Investing for a happy retirement –
Retirees want income but can't
afford volatility.**

Luke Shatner, CEO of Asteroid,
discusses our High Yield Bond Fund.
Check it out!

Like (4) · Comment · Share · 2 days ago

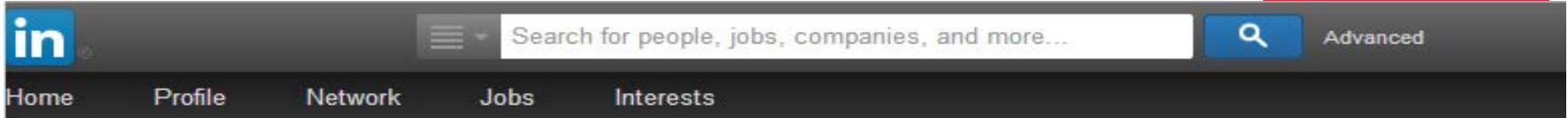
- Article was filed late with Advertising Regulation.
- Title is misleading as it implies the product discussed, a high yield bond fund, is not volatile.

Asteroid REITS - Looking for stability in a rising interest rate environment and protection from market volatility? Very compelling article about non-traded REITs by our friends over at REITS 'R' US. www.reitsrus.com/article

Like · 1 day ago

- Unwarranted claim, especially when discussing REITS.
- Responsibility of Asteroid to ensure third-party links are not misleading.

Taken from handout at FINRA Conference



Daenerys Targaryen

Portfolio Manager / DragonFire Growth Fund

Dragonstone

Current: DragonFire Growth Fund

Previous: Meereen Advisors LLC

▼ 1 recommendation



Jon Snow

King in the North / DragonFire Growth Fund Investor

I have invested in the DragonFire Growth Fund for over ten years and think that Daenerys is a great portfolio manager. The Fund's average annual returns are always above the total return of the S&P 500 index and the Fund frequently outperforms the other funds in its peer group.

▼ 1 recommendation



Khal Drogo

Khal of the Dothraki

My friend Daenerys is the best! She loves to travel to foreign countries and meet people. She also has adorable dragons.

LINKS TO THIRD-PARTY SITES:

- The SEC has employed adoption and entanglement theories in the context of a company's responsibility for third-party information that is hyperlinked to its Website
- Firm can't know or have reason to know that the site contains false or misleading information



SEC GUIDANCE ON THE TESTIMONIAL RULE AND SOCIAL MEDIA

- Genuine third-party social media commentary can be useful to investors
- Linking to commentary on third-party social media sites does **not** implicate the testimonial rule if **three conditions** are met:
 1. The social media site provides independent content
 2. There is no material connection to the independent site that could jeopardize its independence or the independence of the commentary posted on the site
 3. All testimonial commentary from the site is included
- Entanglement and adoption may implicate the testimonial rule

SEC Division of Investment Management Guidance on the Testimonial Rule and Social Media (March 2014)



SEC GUIDANCE ON THE TESTIMONIAL RULE AND SOCIAL MEDIA

- Placing advertisements on the third party site does not jeopardize the site's independence
- List of contacts or “friends” on the social media website of an adviser or its personnel not an impermissible testimonial, even if the list is a partial client list (may still be a misleading advertisement)
- May provide links to third party sites, with caution – See *Us On*



Angie's list

SEC Division of Investment Management Guidance on the Testimonial Rule and Social Media (March 2014)

COMMENTING GUIDELINES DOS AND DON'TS

DO:

- Read [third-party social media site's] terms of service and privacy policy, as they apply to communications through the page/account

DON'T:

- Post personal information or information about accounts
- Allow testimonials about the performance of investments with the firm
- Post investment advice or recommendations about specific stocks or funds
- Post offensive or defamatory comments
- Post illegal information, such as material, non-public information (insider trading)
- Allow customer-service related questions – instruct clients to contact directly





DRAFTING SOCIAL MEDIA POLICIES

SOCIAL MEDIA USE BY INVESTMENT ADVISERS

- **90%** of firms have adopted formal written policies and procedures to govern the use of social media by employees, up from 89% in 2015 and 83% in 2013
 - Additional 3.5% have informal policies
- **37%** of firms prohibit use of personal social networking websites for business purposes, down from 47% in 2015, and 49% in 2013
 - 71% test compliance with the firm's social media policy, up from 70% in 2015, 63% in 2013)
 - 31.5% test annually

KEY TAKEAWAYS IN DRAFTING SOCIAL MEDIA POLICIES

- Identify business purposes for which firm wants to use social media, identify risks and draft procedures around purposes and risks
 - Perform cost-benefit analysis and identify resources available
 - Coordinate legal/compliance, IT, privacy departments on enterprise-wide basis to ensure policy addresses applicable laws
- Be specific about permitted or prohibited sites and permitted/prohibited features of those sites
- Specify account ownership, particularly for accounts used mostly for business purposes
- Monitor changes to features/settings on permitted sites and modify policy, as appropriate
- Incorporate regular training and education into the policy



KEY TAKEAWAYS IN DRAFTING SOCIAL MEDIA POLICIES

- Organize and identify the process for pre-approving required content and monitoring interactive content/consider live monitoring
- Make sure employees separate business and personal accounts
- Establish the extent to which personal use is permitted during business hours
- Identify inappropriate personal uses of social media (e.g., defamatory or illegal content, disparagement of competitors, use of company logo or other suggestions of endorsement, etc.)



KEY TAKEAWAYS IN DRAFTING SOCIAL MEDIA POLICIES

- Consider issues related to personal devices (e.g., monitoring, recordkeeping, unauthorized access, ability to separate business and personal communications)
- Monitor whether employee usage complies with policies and procedures and consider employee certifications
- If budget permits, use vendors for monitoring, site-blocking and recordkeeping





Questions?



K&L GATES