

Client Alert

SEC Guidance Clarifies Application of Testimonial Rule to Social Media

April 7, 2014. Newly-released guidance from the U.S. Securities and Exchange Commission may grant investment advisers more freedom to use social media as part of their marketing programs, and may also provide prospective investors with more options for researching investment advisers.

Under Rule 206(4)-1(a)(1) (the “Testimonial Rule”) of the Investment Advisers Act of 1940, investment advisers are generally prohibited from using testimonials in their advertising, due to the concern that they may highlight favorable comments over negative ones and thereby mislead investors. However, a new Guidance Update from the SEC’s Division of Investment Management (<http://www.sec.gov/investment/im-guidance-2014-04.pdf>) states that investment advisers are permitted to publish, in their own marketing materials and on their own websites, independent, public commentary on their services that is originally found on social media websites, if:

- the investment adviser does not have any material connection with, or the ability to affect which commentary is included in, or how the commentary is presented on, the social media website, such as by paying others to author content, or having the ability to edit content, on the social media website;
- the independent social media site provides content that is independent of the investment adviser, which would preclude the investment adviser from authoring content or paying the site to publish preferred content; and
- the investment adviser publishes all the commentary in its entirety and in a manner that does not give prominence to any subset of the commentary.

Investment advisers may also direct clients or prospective clients to independent social media websites in their print or online marketing materials, and may “friend” their clients on social media websites, so long as the advisers do not create the inference that such “friends” have experienced favorable results from investing with them.

The SEC did note that additional factors might be relevant in analyzing whether the Testimonial Rule would be implicated in a particular instance, including whether visitors to the particular social media website were restricted in providing their commentary. The SEC clarified that if a website requires commentators to subscribe to the site in order to comment, that would not be viewed as a restriction. But the agency provided no further guidance as to

when other limitations imposed, or actions taken, by a website – such as editing out or deleting offensive comments or imposing space limitations – might rise to the level of impermissible restrictions.

If you have any questions concerning the SEC's guidance, or any other corporate-, securities-, or fund-related inquiries, please feel free to contact the Morrison Cohen attorneys named below (or your usual Morrison Cohen contacts):

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