

At Least One Big Fish Enters the Murky Regulatory Waters of Social Media

Author: William M. Krogh, Associate, Philadelphia

Author: Daniel Z. Herbst, Associate, Washington, D.C.

Author: Amy J. Greer, Partner, Philadelphia & New York

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On May 25, 2011, Morgan Stanley Smith Barney announced that it is launching a staged rollout of a program that would allow its financial advisors (FAs) to interact with clients and others on social media websites Twitter and LinkedIn through pre-approved public updates and private LinkedIn emails, invitations, and introductions. Although Josh Brown's *Wall Street Journal* post downplayed the development as "pointless," Morgan Stanley's program marks a significant change in the use of social media by the securities industry. Morgan Stanley is taking a calculated risk to use the free-flowing and spontaneous technology of social media to communicate with customers within a context of securities regulation that heavily controls such communications, with the Securities and Exchange Commission (SEC) and industry self-regulatory organizations devoting significant attention to the issue.

The First Wave and Morgan Stanley's New Splash to Social Media

As reported by Registered Rep., an internal firm memorandum announced that starting next month, Morgan Stanley will begin allowing a small test group of approximately 600 advisors to send pre-approved tweets and status updates on the popular social media sites. Users will also be allowed to send LinkedIn InMail messages, request introductions, send invitations, and participate on the site. However, FAs will not be allowed to "recommend" other FAs, nor be "recommended" by others because of the regulatory rules surrounding the use of testimonials.

Although somewhat limited at first, Morgan Stanley plans to expand the program and loosen the reins. The firm suggested that in the future it may expand to Facebook, the largest social media platform.

Despite its limitations, the program marks a major shift from Morgan Stanley's previous policy, which limited FAs' use of social media to the creation of profiles, but prohibited posting updates or sending messages. Although other brokerages have experimented with individual messaging

and making personal connections on an individual basis using social media, Morgan Stanley appears to be the first firm to permit the use of public updates sent to a broader audience.

The Challenging Regulatory Framework Affecting Use of Social Media

There is an inherent tension between social media's ability to instantly reach a broad network of potential customers, and securities regulation. Securities laws and regulations, such as the fair disclosure provisions of Regulation FD, the antifraud provisions of Section 10(b) of the Securities Exchange Act and Rule 10b-5 thereunder, and the advertising restrictions of Rule 206(4)-1 under the Investment Advisers Act, provide a strict regulatory framework aimed at protecting investors and the integrity of markets through limits on the flow of information - *and disinformation*. (See [Reed Smith's recent White Paper](#)). Regulatory limits implicated by social media include the timing, content, testimonial promotion (a huge benefit to other industries using social media), and supervisory and retention requirements for all communications.

The Financial Industry Regulatory Authority (FINRA) also enforces industry standards on its regulated persons, currently broker-dealers, and has created a Social Networking Task Force to provide guidance on the industry's use of social media. On January 25, 2010, [FINRA released Regulatory Notice 10-06](#) (See [Reed Smith's recent client alert](#)), which sought to create rules to protect investors and ensure that financial firms are able to effectively and appropriately supervise their associated persons' participation in these sites. The Notice announced requirements relating to social media site content and recordkeeping, suitability issues, the differing treatment of static versus interactive content, required pre-approvals, supervision, and the circumstances under which third-party content posted on social media sites established by brokerage firms may be attributed to those firms.

The regulatory framework affecting social media is continually evolving, and regulatory agencies are keenly focused on social media and firms that use it. FINRA's Social Media Task Force recently met to discuss updating its regulatory notice. In addition, as reported in [Investment News February 15, 2011](#), the SEC recently undertook a sweep of registered investment advisers to gather information about their use of social media. The sweep also focused on gathering information about policies and procedures implemented by RIAs governing employees' use of

social media, the training provided concerning those policies, and the retention of records of employee social media use, including non-business and networking-site use.

Impact of Morgan Stanley's Program

Morgan Stanley's staged rollout of this new program is significant within the context of the regulatory framework of the securities industry. Regulation and regulatory attention necessitated the modest scope of Morgan Stanley's first wave. Yet, Morgan Stanley's move marks a key point in the evolution of the industry's communications. Firms will be watching closely to see if Morgan Stanley's program and social media policy can be successful from a business perspective, and its success could signal the beginning of a shift in the industry toward wider and more immediate content distribution.

Meanwhile, the SEC and FINRA will be watching closely as well. Before other firms rush to adopt similar social media programs, they should be cognizant of the unique compliance challenges presented by social media, and ensure they have the internal policies and procedures in place to maintain compliance.

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