

## SEC Enforcement and Exam Attention/Investment Adviser Use of Social Media

February 09, 2012

### Client Advisory

February 9, 2012 by Faith Colish, Mary Joan Hoene, Guy P. Lander, Ethan L. Silver and Andris J. Vizbaras

### SEC Charge In Social Media Scam

On January 4, 2012, the United States Securities and Exchange Commission ("SEC") charged Anthony Fields, an Illinois-based investment adviser with securities law violations in connection with an offering to sell more than \$500 billion of fictitious securities through various social media websites, such as LinkedIn. According to the SEC's order instituting administrative proceedings against Fields<sup>[1]</sup>, his firms, Anthony Fields & Associates ("AFA") and Platinum Securities Brokers ("Platinum"), Fields allegedly promoted fictitious "bank guarantees" and "medium-term notes" on LinkedIn discussions; made multiple fraudulent offers through his website and in SEC filings; and gave potential investors false and misleading information about AFA's assets under management and the clients and operational history of AFA and Platinum. The SEC also alleged that Fields failed to maintain required books and records and held himself out as a broker-dealer although he and his firms were not registered and he had no experience trading securities. Although there were no known victims of the alleged scheme, the social media and website postings resulted in indications of interest from many potential buyers who responded to the postings by e-mail, according to the SEC. This enforcement action can be viewed as a "message" to highlight the SEC's concerns about using social media when offering of securities and investment advice.

### The SEC Alerts Regarding Social Media

The SEC attached to its news release describing its case against Fields<sup>[2]</sup> two related alerts regarding the use of social media by investment advisers. An **Investor Alert** entitled "Social Media and Investing: Avoiding Fraud," seeks to inform investors about fraudulent investment schemes that use social media and provides tips to help investors avoid fraud online.<sup>[3]</sup> A **Risk Alert** from the Office of Compliance Inspections and Examinations ("OCIE") entitled "Investment Adviser Use of Social Media," contains staff observations of investment advisers' use of social media, notes compliance concerns that may arise from the use of social media by registered investment advisers ("RIAs"), and offers suggestions for complying with the antifraud, compliance, and recordkeeping provisions of the federal securities laws. The Risk Alert suggests that RIAs using social media should adopt, and periodically review the effectiveness of, their compliance policies and procedures regarding social media in the face of rapidly changing technology. An overview of the compliance considerations identified by the SEC staff in the Risk Alert is provided below.

### Summary of OCIE's Risk Alert: Investment Advisers Use of Social Media

OCIE noted that many RIAs have multiple overlapping procedures that apply to advertisements, client communications and electronic communications generally, which may not specifically be focused on the use of social media. The Alert expresses concern that this lack of specificity may cause confusion as to what procedures or standards apply to social media use, and notes a non-exhaustive list of factors for RIAs to consider when assessing the effectiveness of their compliance programs and implementing improvements, including usage guidelines,

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content standards, pre-approval of contents, monitoring, safeguards for third-party postings, and recordkeeping and retention. We observe that other recent Enforcement actions have found violations where firms' policies and procedures are placed "on a shelf" and not implemented or continuously updated. At a minimum RIAs should be aware that existing policies may already cover social media use, and consider whether their procedures to implement the policies are adequate.

The full text of the Risk Alert is available at <http://www.sec.gov/about/offices/ocie/riskalert-socialmedia.pdf>

The Risk Alert provides only suggestions by the SEC staff, rather than requirements or a safe harbor "checklist." It is unusual for OCIE to issue such guidelines, which are not rules or interpretation that have had the benefit of public comments. The Alert demonstrates that the staff's focus on issues that arise when RIAs and investment adviser representatives (IARs) use social media and the staff's view that use of social media should be monitored closely as part of a compliance program. As Robert Kaplan, Co-Chief of the SEC Enforcement Division's Asset Management Unit stated in the SEC's news release regarding the charges against Fields, "[The enforcement action against Fields] reflects our determination to pursue fraudulent activity on new and evolving platforms."

Considering the Alerts, RIAs should pay close attention to what is communicated via social media and should examine their compliance programs and internal policies and procedures regarding the use of social media. Social media must be treated as a means of communication just like letters, emails, telephone calls and print advertising. Social media may involve a higher level of risk, in part because it is a new phenomenon, but mainly because it can be used so easily. The first step could be a social media "audit" to determine if and how social media is being used. Such an audit could also isolate the most appropriate social media channels for potential use by an RIA and its IARs. RIAs should identify conflicts and other compliance factors currently creating risk exposure for them and their clients in light of social media usage, and evaluate whether their existing policies and procedures effectively address those risks. The Risk Alert will be a helpful resource when checking the sufficiency of the existing policies and procedures. A firm's policies and procedures should be tailored to its circumstances and must always be developed around actual practices within the firm. Carter Ledyard & Milburn LLP can help investment advisers deal with this process.

#### **FINRA Guidance on Use of Social Media**

Investment advisers, as such, are not subject to FINRA oversight. However, FINRA has issued guidance regarding social media for broker-dealers,[4] which investment advisers may want to consider when evaluating and revising their social media policies and procedures. A Client Advisory published by Carter Ledyard & Milburn LLP relating to these FINRA Regulatory Notices is available at <https://www.clm.com/news-and-insights>

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If you have any questions on anything written herein or require assistance in amplifying and adapting your firm's procedures to deal with this developing technology and the recent SEC guidance, please contact one of the following attorneys[5]:

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[1] The order is available at <http://www.sec.gov/litigation/admin/2012/33-9291.pdf>[2] The news release is available at <http://www.sec.gov/news/press/2012/2012-3.htm>[3] The Investor Alert is available

at <http://www.sec.gov/investor/alerts/socialmediaandfraud.pdf>[4] Regulatory Notices 10-06 and 11-39, available at <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p120779.pdf> and <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p124186.pdf>[5] Carter Ledyard & Milburn LLP recognizes the significant assistance of Jayun Koo, an Associate Attorney, in drafting this Client Advisory.

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