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## Navigating the Perfect Storm

By Gary Davis Jr., VP Practice Management, MarketCounsel

*Advisors clamor for social media amid minimal regulatory guidance but growing regulatory concern.*



A quick glance at this month's trade publications will tell you everything you need to know about the snowballing furor surrounding the need for advisors to actively engage in social media as a means for acquisition, retention, cross-selling and professional networking with centers of influence.

"RIAs have the opportunity to use social media to build business." – May 15th Investment News

"Cambridge, Commonwealth vault advisors into social media." – May 6th RiaBiz

"Tweets that mean business." – May 17th Financial Advisor

"Advisors should use LinkedIn proactively." – May 20th Financial Advisor

"MSSB frees advisors to post on Social Media." – May 25th FundFire

Social media has evolved beyond the "passing fad" stage and has cemented its place in the social fabric. Many advisors are rightly concerned that they are missing out on a tremendous opportunity to more actively and instantaneously engage with clients and prospects. But, as usual, the regulatory fog is causing many firms to tighten the reins, imploring their advisors to refrain from jumping into the deep end of the social media pool until more substantive regulatory guidance is forthcoming.

At present, the only significant regulatory opinion on social media can be found in FINRA Regulatory Notice 10-6 which was published in January 2010 to provide "guidance on blogs and social networking websites." Based on a "sweep letter" sent by the SEC this past February to a number of advisory firms intended to ascertain information on advisors' use of social media (specifically third-party sites such as LinkedIn, Facebook and Twitter, as well as postings on blogs), SEC guidance may be forthcoming.

So, the pivotal question remains – just how exposed are advisors who are actively engaging in social media? What are the key areas of concern? And what are the essential best practices you need to be aware of in order to mitigate potential risk?

Archiving is just the tip of the iceberg

Rule 204-2 of the Advisers Act mandates the archiving and retention of most client communications and advertising. But is a blog about organizational changes at your firm, or a tweet of thanks to your amazing support team really an advertisement? As far as regulators are concerned, the answer is "yes." It's best to assume that any statement you make online, regardless of its nature, will be considered an advertisement and, as such, will be subject to the appropriate books and records retention rules.



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The problem, however, is that retention and archiving tends to be the beginning and end of compliance efforts for most advisory firms, and some don't even do this much. Very few firms undertake an active social media surveillance effort, and the small percentage that do, typically larger firms, generally employ a reactionary post-publication review process.

Establishing a proactive surveillance process poses a number of challenges, not the least of which is the human capital investment required to effectively monitor and review the seemingly endless sea of electronic communications as they expand beyond merely email and begin to encompass the various modes of social networking.

Not only do Rule 206(4)-1 prohibitions regarding deceptive practices and untrue or misleading statements need to be monitored, but the complexity of surveillance gets ratcheted up when dealing with social media and blogs. As a simple example, how many advisors are aware that those seemingly invisible "metatags" and keywords that often are embedded in a blog to help search engines identify the content can also be construed as false or misleading?

Compliance technology rises to the challenge

For now, a number of firms are sitting on the sidelines and taking a "wait and see" approach to social media. But that may not be their best move. The communication benefits are compelling, the mediums are only maturing, and social networking is here to stay.

The key to effectively navigating the impending regulatory storm surrounding social media is three-fold – you need to effectively leverage emerging technology to minimize the human capital impact on your operation; you need to put a comprehensive, proactive process in place for the surveillance, archiving and retention of social media; and you need to document those processes in your firm's written policies and procedures, or other files.

While there have emerged a number of technology solutions that address a firm's social media archiving and retention concerns, the challenge has been in finding a solution that will also provide an effective compliance monitoring and surveillance functionality. We work in a highly-specialized and uniquely regulated industry where "off-the-shelf" solutions are largely ineffective.

That's why in 2007, MarketCounsel, the industry's leading regulatory and compliance consulting firm, launched its MailBanc platform for email archiving and surveillance. And through subsequent releases, upgrades, and integrations with other established providers, the MailBanc service now incorporates social media activity from LinkedIn, Twitter, Facebook and just about any other social media outlet that provides access to an RSS feed (including blogs).

By integrating with a firm's existing email infrastructure (including the popular Microsoft Exchange, Google Apps, POP mail, among others), MailBanc ensures that copies of every email sent and received are stored in the secure archive for a minimum of six years, during which time they cannot be either edited or deleted. Similarly, MailBanc archives all social media activity by a monitored user, no matter the method of publishing. Unlike other solutions currently available, the tool is connected to the popular social networking sites at the API level, thereby archiving all activity without requiring the use of any specialized applications. To facilitate the compliance officer's review, or the retrieval of communications in the event of a regulatory exam, the archive provides robust search and retrieval capabilities enabling quick access of emails sent by a particular person, during a specific time period, or with certain administrative notes ... to name a few.

However, it's the ability of MailBanc's Message Surveillance engine to effectively and proactively detect compliance violations that serves to differentiate the platform from others. MailBanc's close association with MarketCounsel affords a degree of regulatory compliance insight that other archiving and retention services simply don't have. With a robust lexicon of built-in keywords and phrases, the surveillance engine provides a comprehensive rule set for compliance. Recognizing that not all advisory firms fit the same mold, the default policies and rules are fully customizable, able to be added to or modified, applied to inbound- or outbound-only communications, or select groups of individuals within the organization. With the inclusion of social media activity in the archive, the Message Surveillance also reviews all captured social media activity to

ensure compliant activity in this new age of communication.

To tweet or not to tweet...that's not the question

Sooner or later, investment advisors will have no choice but to join the world of social networking. Whether you embrace the new media or ultimately are dragged kicking and screaming into the future, now is the time to explore and contemplate best practices. The regulators may soon weigh-in with more concrete rules and regulations regarding social media. But the general expectation is that current email and advertising regulations serve as a strong indicator for their direction.

What will prevent savvy advisors from capsizing in this roiling sea of social media regulation, however, is the foresight to carefully document the policies, procedures and processes surrounding the surveillance and archiving of social networking communications.

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Gary Davis, Jr. is Vice President, Practice Management with MarketCounsel, the leading business and regulatory compliance consulting firm to some of the country's preeminent entrepreneurial investment advisors. Its comprehensive service offering delivers sound, yet business-savvy, regulatory compliance solutions. The firm pairs best-of-class compliance professionals with state-of-the-art technology to meet, anticipate, and exceed the exacting needs of its clients. From the startup of an investment advisor through its RIA Incubator program to the outsourced compliance department capabilities of the RIA Institute, MarketCounsel's service platform consistently delivers on the promise of extraordinary service and trusted counsel.

