

SUPERVISING THE USE OF SOCIAL NETWORKING WEBSITES BY FINANCIAL SECTOR INTERMEDIARIES

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The use of social media, discussion forums and other websites for business purposes, as a means of communicating with the public, raises increasingly significant compliance issues for regulated entities of the financial sector. Such use may expose registered or certified representatives and, consequently, their firms, to previously unheard of but nonetheless real non compliance and reputational risks.

The integration of social media in the supply chain of financial products or services may be the result of a deliberate business strategy, but it can also result from purely fortuitous circumstances, such as a simple 140 character communication made by a regulated person apparently acting in an “official” capacity. How can these activities be supervised?

The current regulatory framework imposes many obligations on firms and their representatives to prevent false or misleading representations, ensure fair treatment of clients and even enable them to keep their books and records properly. These obligations are imposed in sufficiently general terms to include interactive electronic communications.

Properly discharging these obligations thus requires implementing well adapted control policies and procedures. This often requires imaginative efforts, especially when the regulatory framework or the official interpretations thereof by regulators do not yet offer guidance to interested parties. Such is presently the case in Quebec, where the Autorité des marchés financiers has not yet adopted specific rules or guidelines to control the use of websites and social networks by persons subject to regulatory standards because of the title that they use, persons who appear to be subject to these standards, or persons who take certain actions which may only be legally taken by such persons.

When it is possible to do so, one may refer to foreign regulatory precedents, which can be very useful as an aid to compliance with general regulatory principles and make up for the absence of specific rules. With respect to the control of the use of websites and social network by brokers and their representatives, the recent regulatory notice 11-39 of the *Financial Industry Regulatory Authority* (“FINRA”), the U.S. securities self-regulatory organization, certainly proposes the most interesting guidelines.

On August 18, 2011, FINRA published its notice 11-39, “*Social Media Websites and the Use of Personal Devices for Business Communications*”. This guideline aims to adapt the rules governing the supervision of representatives and the preservation of communications by firms to the new information technology environment created by the social networks. It provides practical guidance for meeting applicable regulatory requirements and demystifies certain aspects of the application of traditional rules. Lastly, it sets out certain key principles for carrying on business intended for the U.S. securities industry.

The most interesting are:

- ▶ Exchanges or professional advice of representatives on social media and discussion forums constitutes business communications and representations and be the subject of similar supervision by the firms.
- ▶ It is the content of the communications, exchanges and advice on the Internet that must be examined to determine whether they constitute communications made in a professional capacity or for business purposes by a firm or representative.
- ▶ The content of the communications exchanged or published also constitutes the criterion for determining whether there is an obligation on the firm or representative to keep records of such communications.

- ▶ Furthermore, a firm must take the required measures to prevent current or potential clients from being directed towards a website where he or she may receive false or misleading information.
- ▶ Lastly, to ensure compliance with its regulatory obligations, a firm must offer appropriate training and education to its representatives on the use of social media and discussion forums on the Internet.

These general principles may also inspire the implementation of risk mitigation mechanisms to be applied in the same circumstances by any other types of regulated entities within the financial sector, such as insurance firms and representatives.

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