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IT IS TIME FOR INVESTMENT ADVISERS TO JOIN THE CONVERSATION ABOUT SOCIAL MEDIA

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I. INTRODUCTION

"INCREDIBLE GAINS" or "HUGE UPSIDE AND ALMOST NO RISK" are generally signs of fraud.[1] However, would the untrained eye recognize a LinkedIn post saying, "Medium Term Notes, Cash Backed, Deutsche Bank, Credit Suisse, HSBC, JPMorgan Chase, BNP Paribas, UBS, RBS or Barclays, Ten (10) years and one (1) day. Fresh Cut 7.5% expected. USD 500 Billion (USD 500,000,000,000) with Rolls and Extensions…" as a fraudulent claim?[2] During 2010 and 2011, investment adviser, Anthony Fields, engaged in a prime bank scheme[3] by posting the above and similar statements to a LinkedIn discussion group with over 1,000 members.[4] The Securities and Exchange Commission

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1. OFFICE OF INVEST. EDUC. AND ADVOC., SEC. AND EXCH. COMM'N, *Investor Alert: Social Media and Investing - Avoiding Fraud* 2 (2012), http://www.sec.gov/investor/alerts/socialmediaandfraud.pdf.

2. In the Matter of Anthony Fields, Order Instituting Administrative and Cease-and-Desist Proceedings and Notice of Hearing Release No. 3-14684 at 3, 2012 WL 19759 (Sec. Exch. Comm'n Jan. 4, 2012), *available at* https://www.sec.gov/litigation/admin/2012/33-9291.pdf.

3. A prime bank scheme entices the victim to send money to a foreign bank, subsequently transferred to fraud artist's own account, by offering high yields in a relatively short period. Furthermore, "they claim to have access to 'bank guarantees' that they can buy at a discount and sell at a premium," which they resell to allegedly produce exceptional returns on investment. *Common Fraud Schemes*, FBI, http://www.fbi.gov/scams-safety/fraud (last visited Sept. 27, 2014).

4. In the Matter of Anthony Fields, Initial Decision Release No. 3-14684 at 1-2, 2012 WL 6042354 (ALJ Dec. 5, 2012), *available at* http://www.sec.gov/alj/aljdec/2012/id474cff.pdf.

("SEC")[5] charged Fields with offering more than $500 billion in fictitious securities through various social media[6] platforms.[7] The court found he violated antifraud, registration, and other provisions of the federal securities laws.[8]

Fraudsters like Anthony Fields "are quick to adapt to new technologies to exploit them for unlawful purposes."[9] Using LinkedIn to conduct a prime bank scheme is one way fraudsters take money from investors; platforms like Facebook and Twitter have been used for pump-and-dump schemes, scalping practices, and spreading false negative rumors.[10] These tactics leave investors and the financial market vulnerable. This is increasingly problematic because a growing number of individuals use social media.[11] As of January 2014, 74 percent of adults online use social media.[12] The pervasiveness of social media is seeping into the investment advisory industry; a real issue for key players such as investors, registered investment advisers[13] ("investment advisers"),

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5. Securities and Exchange Commission is a "five-member federal agency that regulates the issuance and trading of securities to protect investors against fraudulent or unfair practices." *BLACK'S LAW DICTIONARY 1559* (10th ed. 2014).

6. Social media: "forms of electronic communication (as Web sites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (as videos)." *Social media*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/socialmedia (last visited Sept. 27, 2014). The more prominent forms of social media include Facebook, LinkedIn, Twitter, and YouTube. Lawrence P. Stadulis et al., *Investment Adviser Use of Social Media and Related Regulations*, *in* INVESTMENT ADVISER REGULATION – A STEP-BY-STEP GUIDE TO COMPLIANCE AND THE LAW 60-1, 60-3 - 60-4 (Clifford Kirsch ed., 3rd ed. 2013).

7. Press Release, SEC. & EXCH. COMM'N, SEC Charges Illinois-Based Adviser in Social Media Scam (Jan. 4, 2012), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171487332#.VCcWyfldX-t.

8. In the Matter of Anthony Fields, SEC Initial Decision Release No. 3-14684 at 1, 2012 WL 6042354 (ALJ Dec. 5, 2012), *available at* http://www.sec.gov/alj/aljdec/2012/id474cff.pdf.

9. SEC Charges Illinois-Based Adviser in Social Media Scam, *supra* note 7.

10. Michael Shaw, *Social Media Role Increases in Securities Trading, Fraud,* CQ ROLL CALL, July 28, 2014, at 1.

11. Kelsey Jones, *The Growth of Social Media v2.0,* SEARCH ENGINE J. (Nov. 15, 2013), http://www.searchenginejournal.com/growth-social-media-2-0-infographic/77055/.

12. *Social Networking Fact Sheet,* PEW RESEARCH CTR., http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/ (last visited Sept. 27, 2014).

13. Registered investment adviser is a legal term because the individual or entity must register with the SEC or a state regulator, depending on amount of an adviser's regulatory assets under management. *Selecting Investment Professionals*, FINRA, http://www.finra.org/Investors/SmartInvesting/GettingStarted/SelectingInvestmentProfessional/P117278 (last visited Sept. 23, 2014).

and the SEC.[14] Investors are increasingly using social media to access investment information and to help them with financial decisions.[15] While slower than the general population, three out of five (60 percent) investment advisers use social media for business purposes,[16] including communicating with existing and potential clients, promoting services, educating investors, and recruiting new employees.[17] Furthermore, 53 percent of investment advisers indicated a plan to increase their use of social media in the next few years.[18]

Although eager to leverage social media, 55 percent of investment advisers stated that the biggest challenge to using social media for business purposes was uncertainty over compliance and regulatory issues.[19] An area of confusion is the publication of advertisements by investment advisors that feature public commentary about them that is originally from an independent, third party social media site.[20] Currently, the SEC has provided limited guidance to investment advisers addressing social media, and no definitive rules or regulations exist.[21] The murky guidance raises concerns for investment advisers seeking to embrace social media by using and responding to public commentary on third party social media sites. Investment advisers fear that such use may implicate the Testimonial Rule, which prohibits advertisement that "refers, directly or indirectly, to any testimonial concerning the adviser or the advice given." [22] The considerable uncertainty over compliance demands a modernized regulatory framework for investment ad-

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14. SEC. AND EXCH. COMM'N, OFFICE OF COMPLIANCE INSPECTIONS AND EXAM., NAT'L EXAM. RISK ALERT, INVESTMENT ADVISER USE OF SOCIAL MEDIA (Jan. 4, 2012), *available at* http://www.sec.gov/about/offices/ocie/riskalert-socialmedia.pdf.

15. SEC Charges Illinois-Based Adviser in Social Media Scam, *supra* note 7.

16. THE SECOND ANNUAL STUDY OF ADVISORY SUCCESS, PERSHING 14 (2014), http://www.investmentnews.com/assets/docs/CI95600716.pdf.

17. NAT'L EXAM. RISK ALERT, *supra* note 14.

18. THE SECOND ANNUAL STUDY OF ADVISORY SUCCESS, *supra* note 16.

19. Matt Sirinides, *Now is the time for advisers to embrace social media*, INVEST. NEWS (July 2, 2014, 12:48 PM), http://www.investmentnews.com/article/20140702/BLOG18/140709984/now-is-the-time-for-advisers-to-embrace-social-media.

20. DIV. OF INVEST. MGMT, US. SEC. AND EXCH. COMM'N, NO. 2014-04, IM GUIDANCE UPDATE: GUIDANCE ON THE TESTIMONIAL RULE AND SOCIAL MEDIA 1 (2014), *available at* http://www.sec.gov/investment/im-guidance-2014-04.pdf. An independent, third party social media site is a site that "predominantly host user opinions, beliefs, findings or experiences about service providers, including investment advisory representatives or investment advisers (*e.g.*, Angie's List)." *Id.* at 8 n.2.

21. Stadulis, A STEP-BY-STEP GUIDE TO COMPLIANCE AND THE LAW, *supra* note 6, at 60-6.

22. Clifford Kirsch, *Advertising by Investment Advisers*, *in* INVESTMENT ADVISER REGULATION – A STEP-BY-STEP GUIDE TO COMPLIANCE AND THE LAW 6-1, 6-4 (Clifford Kirsch ed., 3rd ed. 2013).

visers on their use of social media from the SEC. Regulation would create an industry standard and provide investors with knowledge of what to expect from legitimate investment advisers as opposed to fraudsters. Clarification would protect investors, investment advisers, and the market.

Section II will detail the creation of the SEC, including key that shaped the establishment, goals, and mission of the SEC. Furthermore, it will focus on who is an investment adviser under the Investment Advisers Act of 1940, the controlling legislation on the matter. Section II will also examine the SEC's current guidance on investment advisers' use of social media and the public policy behind the new provisions.

With social media revolutionizing the way individuals communicate and share information, Section III will discuss the advantages and disadvantages of the current guidance regarding investment advisers' use of social media. It will explore how investors are using social media to gather and research information about the financial industry, and it will consider how social media's popularity has changed investors' expectations of social media usage. Section III will also explain the wide spectrum of social media use by investment advisers.

Finally, this comment will discuss how in order for the SEC to continue to protect investors, it can no longer ignore the impact of social media. It will propose the modernization of the SEC's regulatory framework controlling investment advisers, specifically addressing the Testimonial Rule. The antiquated Testimonial Rule reflects investment advisers' use of print and static media to communicate with prospective and current clients,[23] whereas the proposed rule would permit investment advisers, who advertise public commentary from third party social media sites to respond to comments and reviews. In order to resonate with the current interactive climate of social media, the proposed changes to the Testimonial Rule would balance the investment advisers' desire to utilize social media but also preserve the SEC's mission to protect investors.

II. BACKGROUND

A. CREATION OF THE SEC

In pursuit of the American dream, over 20 million large and small

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23. Sonia Gioseffi & Mark Perlow, *Social Media at the Intersection of the Personal and Professional: Challenges for Investment Advisers and Broker-Dealers*, 27 INSIGHTS, Sept. 2013, at 2, *available at* http://www.klgates.com/files/Publication/d6d1db7c-c66a-4271-bc11-8aeaf22ae0a9/Presentation/PublicationAttachment/1d31756a-a765-4209-9ed2-8fc7c3ba47a2/Social_Media_at_%20the_Intersection_of_the_Personal_and_Professional.pdf.

shareholders invested their post-World War I prosperity in the stock market during the 1920s.[24] Unknowingly to these individuals, the stock market would crash in October 1929.[25] The crash was due in part to unreliable information and an abuse of margin financing.[26] The devastating financial crash[27] shattered the public's confidence in the marketplace.[28] Rebuilding the economy required the restoration of the publics' faith in the very markets that took large sums of their money.[29]

It was out of this need that during the height of the Great Depression, Congress passed the Securities Act of 1933 and the Securities Exchange Act of 1934.[30] Together these laws formed the Securities and Exchange Commission ("SEC"), a government agency with the mission "to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation."[31] The SEC has the authority to register, regulate, and oversee individuals in the financial industry such as investment advisers and firms, brokerages firms, and transfer agents.[32] Within the SEC's power is the ability to discipline entities and persons in accordance with established conduct.[33]

B. THE INVESTMENT ADVISERS ACT OF 1940

Championing the SEC's mission, Congress enacted the Investment Advisers Act of 1940 ("Advisers Act") to regulate investment advisers.[34] The investment advisory industry was rampant with problems regarding supervision, assessment of performance fees, and unreliable financial information.[35] The Advisers Act controls investment advisers' con-

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24. *The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, SEC. AND EXCH. COMM'N, http://www.sec.gov/about/whatwedo.shtml (last visited Sept. 23, 2014).

25. *Id*.

26. *Id*.

27. "It is estimated that of the $50 billion in the new securities offered during the 1920s, half become worthless." *Id*.

28. *Id*.

29. *Id*.

30. Securities Act of 1933, ch. 38, 48 Stat. 74 (1933) (current version at 15 U.S.C. § 77a–77aa (2012)); Securities Exchange Act of 1934, ch. 404, 48 Stat. 885 (1934) (current version at 15 U.S.C. § 78d–78d-9 (2012)); *The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, *supra* note 24.

31. *The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, *supra* note 24.

32. *Id*.

33. *Id*.

34. Investment Advisers Act of 1940, ch. 686, 54 Stat. 852 (1940) (current version at 15 U.S.C. § 80b-1–80b-21 (2012)); JEFFREY J. HAAS & STEVEN R. HOWARD, INVESTMENT ADVISER REGULATION IN A NUTSHELL 3 (2008).

35. Kirsch, A STEP-BY-STEP GUIDE TO COMPLIANCE AND THE LAW, *supra* note 22, at

duct, including the maintenance of records, registration, and advertisement.[36] To protect the investing public, the Advisers Act sought to prevent investment advisers from engaging in deceptive or fraudulent practices by eliminating, or at least disclosing, all conflicts of interest.[37] In furtherance of that goal, Section 206(4)-1 of the Advisers Act ("Advertisement Rule") restricts certain advertising practices.[38]

The Advertisement Rule provides five categories of prohibited advertisement: testimonials, past specific recommendations, use of charts, graphs, and formulas without disclosing the limitations, free services without disclosing the obligations, and a catchall clause.[39] Pursuant to the rule, an advertisement includes:

> Any notice, circular, letter or other written communication addressed to more than one person, or any notice or other announcement in any publication or by radio or television, which offers (1) any analysis, report, or publication concerning securities, or which is to be used in making any determination as to when to buy or sell any security, or which security to buy or sell, or (2) any graph, chart, formula, or other device to be used in making any determination as to when to buy or sell any security, or which security to buy or sell, or (3) any other investment advisory service with regard to securities.[40]

Generally, materials intended to maintain current clients or solicit new clients by an investment adviser are considered advertisement.41 Examples of advertisements are marketing brochures, websites, and mass e-mail messages.[42] But in-person conversations or academic articles that discuss portfolio management without offering advisory services are not advertisements.[43]

The most significant and controversial category is Section 206(4)-1(a)(1) of the Advisers Act ("Testimonial Rule").[44] The Testimonial Rule states, that "advertising constitutes a fraudulent, deceptive, or manipulative act if it . . . refers, directly or indirectly, to any testimonial con-

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1-4.

36. *Id*. at 1-4-1-10.

37. HAAS & HOWARD, *supra* note 34, at 3.

38. 17 C.F.R. § 275.206(4)-1 (2012); Kirsch, A STEP-BY-STEP GUIDE TO COMPLIANCE AND THE LAW, *supra* note 22, at 1-7.

39. 17 C.F.R. § 275.206(4)-1(a)(1)-(5) (2012).; Kirsch, A STEP-BY-STEP GUIDE TO COMPLIANCE AND THE LAW, *supra* note 22, at 6-4.

40. 17 C.F.R. § 275.206(4)-1(b) (2012); Kirsch, A STEP-BY-STEP GUIDE TO COMPLIANCE AND THE LAW, *supra* note 22, at 6-2.

41. Kirsch, A STEP-BY-STEP GUIDE TO COMPLIANCE AND THE LAW, *supra* note 22, at 6-2-6-3.

42. *Id*. at 6-3.

43. *Id*.

44. 17 C.F.R. § 275.206(4)-1(a)(1) (2012); Kirsch, A STEP-BY-STEP GUIDE TO COMPLIANCE AND THE LAW, *supra* note 22, at 1-7.

cerning the adviser or the advice given by such an adviser." [45] Testimonial is not defined within the rule.[46] However, the SEC's staff has consistently "indicated that public commentary made by a client endorsing an investment adviser, or a statement made by a third party about a client's experience with the adviser, may be a testimonial."[47]

C. WHO IS AN INVESTMENT ADVISER?

The requirements of the Advisers Act, like the Advertisement Rule, apply only to those individuals who meet the definition of investment adviser.[48] An investment adviser is "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, person who, for compensation, engages in the business of advising as to the value of securities or as to the advisability of investing in, purchasing, or selling securities." [49] Investment advisers provide individually tailored investment advice, manage investment portfolios, and offer financial planning services.[50] An investment adviser may work on behalf of individuals, institutions, including mutual funds, pension plans, hedge funds, or both.[51] Investment advisers must register with the SEC or a state regulator depending on the amount of an investment adviser's regulatory assets that are under management.[52]

Because of time and personnel constraints within the SEC, the legislator sought to shift regulatory authority through the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").[53] The Dodd-Frank Act made the states the primary regulator of small

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45. 17 C.F.R. § 275.206(4)-1(a)(1) (2012); Kirsch, A STEP-BY-STEP GUIDE TO COMPLIANCE AND THE LAW, *supra* note 22, at 6-4.

46. Jay Baris, *New Regulatory Guidance on Use of Social Media by Investment Advisers*, SOCIALLY AWARE (Apr. 7, 2014), http://www.sociallyawareblog.com/2014/04/07/new-regulatory-guidance-on-use-of-social-media-by-investment-advisers/.

47. *Id*.

48. HAAS & HOWARD, *supra* note 34, at 9.

49. Investment Advisers Act of 1940, ch. 686, 54 Stat. 852 (1940) (current version at 15 U.S.C. § 80b-2 (2012)).

50. *Selecting Investment Professionals*, *supra* note 13. Investment advisers should not be confused for financial advisers because the generic term for financial adviser is broker. A broker is required to be a member of FINRA, a self-regulatory organization, and is subject to FINRA's exams, unlike investment advisers, who are not required to belong to a self-regulatory organization. Robert Flippinger, *Investment Adviser Regulation of Public Finance Activity, in* INVESTMENT ADVISER REGULATION – A STEP-BY-STEP GUIDE TO COMPLIANCE AND THE LAW 55-1, 55-3 (Clifford Kirsch ed., 3rd ed. 2013).

51. Kirsch, A STEP-BY-STEP GUIDE TO COMPLIANCE AND THE LAW, *supra* note 22, at 1-2.

52. *Selecting Investment Professionals*, *supra* note 13.

53. Flippinger, A STEP-BY-STEP GUIDE TO COMPLIANCE AND THE LAW, *supra* note 50, at 55-9.

and mid-sized investment advisers and the SEC oversees the larger advisers.[54] The Dodd-Frank Act raised the threshold requiring investment advisers to register with the SEC to after it obtains $110 million of assets under management.[55] However, once registered, a withdrawal is not required until the investment adviser has less than $90 million of assets.[56]

D. CURRENT SEC GUIDANCE REGARDING AN INVESTMENT ADVISER'S USE OF SOCIAL MEDIA

The SEC has been slow to respond to the emergence of social media as demonstrated by the lack of provisions that directly address social media in federal securities laws.[57] No codified rules or regulations exist concerning social media.[58] However, in the last three years, the SEC has provided some observations about social media through letters, alerts, and guidance statements.[59] The limited guidance begins to establish how investment advisers' use of social media fits within existing regulations and laws.[60] In early 2011, the SEC began to solicit investment advisers for information in order to evaluate the revolutionizing effects of social media.[61] The SEC requested documentation on how they use social media, how they retain records of social media use, how advisers maintain third party use of social media, and how they create and maintain social media policies.[62]

On January 4, 2012, the SEC issued an alert entitled, "Investment Adviser Use of Social Media" ("2012 Alert").[63] It was the first time the SEC put anything in writing addressing investment advisers' use of social media.[64] Made possible by the early 2011 collection of information,

54. *Id*.

55. DIV. OF INVEST. MGMT, SEC. AND EXCH. COMM'N, REGULATIONS OF INVEST. ADVISERS 9 n. 45 (Mar. 2013), *available at* http://www.sec.gov/about/offices/oia/oia_investman/rplaze-042012.pdf.

56. *Id*.

57. Stadulis, A STEP-BY-STEP GUIDE TO COMPLIANCE AND THE LAW, *supra* note 6, at 60-6.

58. *Id*.

59. *Id*.

60. *Id*.

61. Jessica Toonkel, *SEC said to 'sweep' advisory firms for social media info*, INVEST. NEWS (Feb. 14, 2011, 3:53 PM), http://www.investmentnews.com/article/20110214/FREE/110219962/sec-said-to-sweep-advisory-firms-for-social-media-info.

62. *Id*.

63. NAT'L EXAM. RISK ALERT, *supra* note 14, at 2.

64. *SEC issues social media alert, brings enforcement action against adviser*, MONEY MANAGER'S COMP. GUIDE NEWSLETTER 4 (Thomson Info. Serv., Washington D.C., Feb.

the 2012 Alert is the SEC staff's observations regarding social media.[65] They indicate that there are factors that investment advisers should consider in complying with federal securities laws during their use of social media.[66] The alert outlines three areas requiring attention, including compliance programs, third party content, and recordkeeping responsibilities.[67] The key takeaway is that investment advisers need to be to very cautious in allowing third party postings on their social media sites.[68] Safeguards need to be implemented to prevent violations of the Advertisement Rule, including social media policies and training.[69] Furthermore, investment advisers need to retain communications made via social media in compliance with Section 204 of the Advisers Act.[70] Section 204[71] establishes investment advisers' obligation to maintain records.[72]

In March 2014, the SEC issued a guidance update entitled, "Guidance on the Testimonial Rule and Social Media" ("2014 Guidance").[73] The Q&A format sought to address advisers' questions about "the nature, scope[,] and application of the rule that prohibits investment advisors from using testimonials in their advertisements."[74] More specifically, the 2014 Guidance explains acceptable ways investment advisers can use social media to advertise public commentary about them from independent, third party social media sites.[75]

The SEC staff states that the facts and circumstance surrounding the statement will determine whether the public commentary on a third party social media site is testimonial.[76] The 2014 Guidance notes that client's comments do not violate the Testimonial Rule if they are from

2012).

65. NAT'L EXAM. RISK ALERT, *supra* note 14, at 2.

66. *Id*.

67. *Id*.

68. Stadulis et al., A STEP-BY-STEP GUIDE TO COMPLIANCE AND THE LAW, *supra* note 6, at 60-11.

69. *Id*.

70. Investment Advisers Act of 1940, ch. 686, 54 Stat. 852 (1940) (current version at 15 U.S.C. § 80b-4 (2012)); *Id*. at 60-13.

71. Investment Advisers Act of 1940, ch. 686, 54 Stat. 852 (1940) (current version at 15 U.S.C. § 80b-4 (2012)). Under the recordkeeping rule, "an investment adviser must maintain virtually all communication between the adviser and its clients." HAAS & HOWARD, *supra* note 34, at 311.

72. *Id*. at 308.

73. DIV. OF INVEST. MGMT, US. SEC. AND EXCH. COMM'N, *supra* note 20, at 1.

74. *SEC: Advisor Use of Social Media Testimonials Sometimes OK*, THINK ADVISOR, http://www.thinkadvisor.com/2014/04/01/sec-advisor-use-of-social-media-testimonials-somet (last visited Oct. 10, 2014).

75. *Id*.

76. Baris, *supra* note 46.

an independent third party review site, such as Yelp or Angie's List.[77] However, the caveat is that the investment adviser must have no control over the third party site, including the ability to edit, submit, or delete the comment.[78] Reviews appearing on a social media site that are created by an investment adviser to promote their own businesses are a violation of the Testimonial Rule.[79] To advertise the comments posted to an independent social media site, the investment adviser must publish the totality of the testimonials in real-time without highlighting or giving prominence to a subset of the testimonials.[80]

E. POLICY CONSIDERATIONS FOR THE TESTIMONIAL RULE

Investment advisers' use of advertisements is a sensitive area because advisers and clients have a fiduciary relationship.[81] Therefore, the investment adviser has a duty to act in the best interest and benefit of the client.[82] The implicit trust in the relationship requires full and fair disclosure by investment advisers to current and potential clients.[83] The regulatory framework of the Advisers Act's Testimonial Rule and subsequent guidance seeks to protect investors.[84] Consequently, it is unlawful for investment advisers to publish false or misleading statements in advertisements.[85] The SEC prohibits testimonials because they "may give rise to a fraudulent or deceptive implication, or mistaken inference, that the experience of the person giving the testimonial is typical of the experience of [all of] the adviser's clients."[86] The SEC's

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77. Mark Schoeff, *SEC OKs use of third party social-media endorsements*, INVEST. NEWS (Apr. 1, 2014, 10:38 AM), http://www.investmentnews.com/article/20140401/FREE/140409995/sec-oks-use-of-third party-social-media-endorsements.

78. *Id*.

79. Suzanne Barlyn, *U.S. SEC issues new social media guidance for financial advisers*, REUTERS (Apr. 1, 2014), http://www.reuters.com/article/2014/04/01/sec-socialmedia-idUSL1N0MT19T20140401.

80. Schoeff, *supra* note 77.

81. *My Adviser Randy Is a "Straight Shooter": SEC Eases Client Testimonial Ban on Social Media Commentary*, IMCA (May 2014), http://www.imca.org/sites/default/files/Legislative_Intelligence/May_2014.html. In SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963), the Supreme Court held an investment adviser will be held to a fiduciary standard in applying antifraud provisions. Kirsch, A STEP-BY-STEP GUIDE TO COMPLIANCE AND THE LAW, *supra* note 22, at 1-5.

82. Capital Gains Research Bureau, Inc., 375 U.S. at 194.

83. *My Adviser Randy*, *supra* note 81.

84. HAAS & HOWARD, *supra* note 34, at 128.

85. *Id*.

86. Michael Kitces, *News Highlight: SEC Issues New Guidance on Social Media And Testimonial Rule 206(4)-1*, KITCES (Apr. 1, 2014, 7:01 AM), http://www.kitces.com/blog/news-highlight-sec-issues-new-guidance-on-social-media-and-

consensus is that the inherent desire to promote favorable comments while suppressing unfavorable ones makes testimonials misleading.[87] To ensure that prospective clients get the full picture, good and bad,[88] SEC wants to discourage the temptation of investment advisers to cherry-pick reviews in published advertisements.[89]

III. ANALYSIS

It is time to stop relying on antiquated rules drafted when advertisements were static. This Comment proposes modifying the 2014 Guidance to reflect the interactive nature of social media. The proliferation of social media has altered investors' behavior and expectations and this proposal encourages the SEC to advance with technology. Under the proposed rule, if an investment adviser advertises public commentary from a third party site, the adviser is permitted to respond to investors' reviews and comments on that particular third party site. The proposed rule would balance the investment advisers' desire to utilize social media while preserving the SEC's mission to protect investors from fraudulent and misleading advertisements.

A. ADVANTAGES OF CURRENT REGULATION AND GUIDANCE

Despite concerns that the ambiguous and sparse regulation would paralyze the financial industry, the use of social media is at an all-time high for investment advisers.[90] The 2012 Alert and 2014 Guidance are both effective means for starting the conversation about social media.[91] Investment advisers have a better understanding of how they can use social media while complying with various provisions of federal securities law.[92] The alert and guidance are part of an informal guide from

testimonial-rule-2064-1/ (alterations in original) (quoting DIV. OF INVEST. MGMT, US. SEC. AND EXCH. COMM'N, NO. 2014-04, IM GUIDANCE UPDATE: GUIDANCE ON THE TESTIMONIAL RULE AND SOCIAL MEDIA 2 (2014)).

87. Gary A. Kibel & Ralph Norton, *SEC permits certain uses of social media by investment advisers and representatives*, DAVIS & GILBERT LLP 1 (Apr. 2014), http://www.dglaw.com/images_user/newsalerts/Advertising_SEC_Permits_Certain_Uses_of_Social_Media.pdf.

88. Schoeff, *supra* note 77.

89. *My Adviser Randy*, *supra* note 81.

90. Michelle L. Jacko, *Today's Social Media Challenges: What Compliance Professionals Need to Know*, PRACTICAL COMPLIANCE & RISK MGMT. FOR SEC. IND. 8 (Sept.-Oct. 2013), *available at* http://www.jackolg.com/Wolters-Kluwer-Today-s-Social-Media-Challenges-What-Compliance-Professionals-Need-to-Know-Sept-Oct-2013.pdf.

91. Baris, *supra* note 46.

92. NAT'L EXAM. RISK ALERT, *supra* note 14.

the SEC staff.[93] Therefore, they do not have the same power and influence as decisions by the SEC Commission or formal rulemaking.[94]

The conservative approach of informal guidance is likely the result of the fast-paced and public nature of social media.[95] The limited guidance provided by SEC has erred on the side of caution rather than progressiveness. Users of social media can disseminate information instantaneously at the click of a button to millions of people. That information can affect stock prices and financial decisions. For example, in 2013, a fake tweet from the Associated Press (@AP) Twitter account sent the U.S stock market into free-fall;[96] Reputable news organization announced an explosion at the Whitehouse in which President Barack Obama was supposedly injured.[97] The United States government quickly addressed the falsity of the hacker's message.[98] However, the market impact was immense, "over $20 billion worth of stock changed hands during the brief trading [period]."[99] Therefore, in an effort to protect investors, the SEC is taking its time to understand social media before establishing formal regulations.

Consistent with the SEC's goals and established rules, the 2014 Guidance follows a "logical path to determining whether certain social media actions could constitute testimonials."[100] For example, the mere fact that a client connects with an investment adviser through social media is non-testimonial.[101] The rationale is that a list of friends does no more than identify an investment adviser's clients. [102] Such action "cannot be viewed either as a statement of a client's experience with, or

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93. *SEC Staff Provides Guidance to Investment Advisers on the Use of Social Media*, ROPES & GRAY (Apr. 16, 2014), http://www.ropesgray.com/news-and-insights/Insights/2014/April/SEC-Staff-Provides-Guidance-to-Investment-Advisers-on-the-Use-of-Social-Media.aspx.

94. *Id*.

95. Joyce Hanson, *Morgan Stanley lets advisers write what they tweet*, INVEST. NEWS (July 1, 2014, 11:51 AM), http://www.investmentnews.com/article/20140701/FREE/140709995/morgan-stanley-lets-advisers-write-what-they-tweet.

96. Dionne Kasian-Lew, *Social media influences investors and that will grow*, LINKEDIN (July 22, 2014), https://www.linkedin.com/pulse/article/20140722214625-36634907-social-media-influences-investors-and-that-will-grow.

97. Adam Shell, *Stocks gyrate wildly after fake terror tweet*, USA TODAY (Apr. 23, 2013 6:31 PM), http://www.usatoday.com/story/money/markets/2013/04/23/stocks-gyrate-wildly-after-fake-terror-tweet/2107089/.

98. Kasian-Lew, *supra* note 96.

99. *Id*.

100. Kitces, *supra* note 86.

101. *Id*.

102. DIV. OF INVEST. MGMT, US. SEC. AND EXCH. COMM'N, *supra* note 20, at 7.

endorsement of, the adviser[]."[103]

While the 2014 Guidance did not answer every question about using social media, it "is a positive step forward for the industry."[104] Publishing the guidance is proof that the SEC does "realize the world is changing and [that they] are trying to adapt [their] rules."[105] The more detailed guidance should give investment advisers "greater confidence" when using social media for business purposes.[106] For some investment advisers, the guidance was a source of encouragement, prompting a more active presence on social media.[107] Previously uncertain and worried investment advisers now have a better understanding of social media compliance.[108] The guidance may prompt investment advisers to expand how they use social media when engaging with current and potential clients.[109]

In 1940, the legislative body drafting the Advisers Act could not have foreseen how the drastic technological advancements would affect the financial industry. The current regulatory framework reflects investment advisers' use of print or static media to communicate with prospective and current clients.[110] The advent of social media has presented several challenges to developing adequate policies and procedures.[111] In attempting to establish compliance rules, the SEC has to try to wrap its arms around a fast-paced form of technology.[112] The practical problem is that current social media sites are rapidly evolving and new sites are constantly being created.[113] For instance, as of October 2014, LinkedIn had grown to 313 million members in just over ten years.[114] A consequence of the constantly evolving nature of social media is that the SEC must establish a workable test to apply to future advancements in technology. Rather than provide a bright line test, the SEC decided to "apply a facts and circumstances test to determine if the marketing materials violate" Section 206 of the Advisers Act.[115] There-

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103. *Id.*

104. Schoeff, *supra* note 77.

105. *Id.*

106. *Id.*

107. *Id.*

108. Baris, *supra* note 46.

109. Schoeff, *supra* note 77.

110. Gioseffi & Perlow, *supra* note 23, at 2.

111. *Id.* at 3.

112. Baris, *supra* note 46.

113. Gioseffi & Perlow, *supra* note 23, at 3.

114. *About LinkedIn*, LINKEDIN, http://press.linkedin.com/about (last visited Oct. 14, 2014).

115. RAJIB CHANDA & TODD MENSZAK, TEN THINGS TO KNOW ABOUT SOCIAL MEDIA IN THE FINANCIAL SERVICES INDUSTRY IN 2013, SOCIAL MEDIA L. & POL'Y REP. 2 (Jan. 2,

fore, the limited guidance provides investment advisers with the flexibility to work freely and creatively within these broad concepts.[116] Without specific rules holding investment advisers back, they can grow in their use of social media.[117]

B. DISADVANTAGES OF CURRENT REGULATION AND GUIDANCE

The 2014 Guidance issued by the SEC "provides some relief for advisers who now have a better idea of the limitations,"[118] but is "some relief" an acceptable standard? No doubt, the current guidance is a starting point,[119] particularly for those investment advisers grappling with the technological advancements. However, the SEC needs to forge ahead and address compliance ambiguities and challenges.

Uncertainty over compliance and regulation for social media is the biggest obstacle for investment advisers.[120] Fear is prohibiting investment advisers from fully utilizing social media to "develop[] their online voice, establish[] their brand, driv[e] referrals, and engag[e] with [existing and potential] clients."[121] Participation in social media will continue to lag as long as 55 percent of investment advisers face an unclear and confusing regulatory scheme.[122] Within many investment advisory firms, fear is hindering the growth of social media.[123] Overcompensating for regulatory deficiencies, "many firms have stricter rules than necessary."[124] Abundant with caution, the large firms are among the slowest in the industry to embrace social media.[125] For instance, Bank of America Merrill Lynch forbids self-authored tweets.[126] Fear has permeated the industry so much that one out of every two investment advisers is completely prohibited from at least one social media site.[127] Outright bans by firms coupled with uncertain regulations ensure that the growth of social media for investment advisers has a dismissal out-

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2013) *available at* http://www.ropesgray.com/files/upload/20120109_Chanda_Menszak%20_%20Bloomberg%20BNA.pdf.

116. CHANDA & GIBBS, *supra* note 115, at 1.
117. *Id*.
118. Baris, *supra* note 46.
119. *Id*.
120. Sirinides, *supra* note 19.
121. *Id*.
122. *Id*.
123. *Id*.
124. *Id*.
125. *Id*.
126. Sirinides, *supra* note 19.
127. *Id*.

look.[128] The current guidance leaves much to be desired by investment advisers.

How can investment advisers avoid stumbling across regulatory landmines in the wake of such an uncertain framework of rules regarding social media? Unfortunately, the guidance does little to relieve ambiguities; instead, fending for themselves, investment advisers must determine how the limited guidance intersects with social media platforms. The logistical implications of the guidance leaves many questions unresolved for investment advisers. Struggling to navigate the undetermined territory, investment advisers ask wholly unanswered questions. For example, do independent third party review sites need to be archived for recordkeeping compliance or are negative reviews considered a client compliant that need to be reported?[129] However, in some instances, the SEC has provided some guidance. For example, investment advisers have asked "[a]re you allowed to respond to negative reviews on these sites?"[130] According to the 2014 Guidance, it says that on an "independent social media site, the investment adviser . . . may not provide subjective analysis of the commentary."[131] But what are the limitations and boundaries of that statement? Are investment advisers rendered defenseless in combatting reputation damaging negative reviews?

C. USE OF SOCIAL MEDIA BY INVESTORS

As of January 2014, 74 percent of adults online use some form of social media.[132] The most popular social media platform is Facebook, but individuals are increasingly venturing onto other platforms.[133] In 2014 and astonishing number of users were active on social media on a regular monthly basis. Facebook had approximately 1.07 billion users' active per month.[134] Twitter had approximately 271 million active users per month.[135] LinkedIn had approximately 187 million users active each

128. *Id.*

129. Kristen Luke, *What SEC Social Media Guidance Means for You*, WEALTH MGMT. MKTG. (Apr. 11, 2014), http://www.wealthmanagementmarketing.net/sec-social-media-guidance/.

130. *Id.*

131. *Id.*

132. *Social Networking Fact Sheet, supra* note 12.

133. Maeve Duggan & Aaron Smith, *Social Media Update 2013*, PEW RESEARCH CTR. (Dec. 30, 2013), http://www.pewinternet.org/2013/12/30/social-media-update-2013.

134. *Social Media Active Users by Network*, SOCIAL MEDIA HAT (July 31, 2014), http://www.thesocialmediahat.com/active-users.

135. *About*, TWITTER, https://about.twitter.com/company (last visited Oct. 10, 2014).

month.[136] Yelp had approximately 138 million active users.[137]

Reaching an unprecedented scale, social media is achieving usage "unseen in traditional media, including newspapers, radio, and television."[138] Social media is an easy way for individuals to communicate, connect, and network with friends, family, and associates.[139] Communication on these platforms can be very informal, and very personal.[140] Additionally, individuals can use social media to gather information about current events like natural disasters, politics, and the economy.[141] The rapid pace at which news is disseminated through social media allows individuals to leverage information as quickly as possible.[142]

The pervasive reach of social media has infiltrated the financial industry. Approximately 90 percent of affluent investors are using social media, professionally and personally.[143] One-third of wealthy investors use "social media specifically for personal finance and investing purposes."[144] Social media "is a 'welcome innovation, making news dissemination more direct and rapid'" according to 40 percent of investors.[145] 60 percent of investors say, "it is a 'useful heads-up for important information.'"[146] Investors are increasingly active on social media to gather financial information with up to 60 percent of investors consulting investment forums on social media.[147] Furthermore, upwards of 60 percent of investors glean information from Twitter and Facebook.[148]

As part of this information gathering process, individuals including investors use online recommendations. Countless social media sites host reviews, Yelp has over 61 million local reviews[149] and Angie's List

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136. *Social Media Active Users by Network*, *supra* note 134.

137. *About Us*, YELP, http://www.yelp.com/about (last visited Oct. 10, 2014).

138. GEOFFREY BARBIER ET AL., PROVENANCE DATA IN SOCIAL MEDIA 1 (Jiawei Han et al. eds., 2013) *available at* http://www.odbms.org/wp-content/uploads/2014/03/Provenance-Data-in-Social-Media.pdf.

139. *Id*. at 3.

140. Jacko, *supra* note 90, at 7.

141. BARBIER, *supra* note 138, at 3.

142. *Id*. at 1.

143. Liz Skinner, *When it comes to social media, advisers should beware but be there*, INVEST. NEWS (Mar. 15, 2014, 12:21 PM), http://www.investmentnews.com/article/20130315/BLOG03/130319951/when-it-comes-to-social-media-advisers-should-beware-but-be-there.

144. Kasian-Lew, *supra* note 96.

145. *AMO Survey: How Institutional Investors worldwide use and rate social media: US findings*, Q4 WEB SYSTEMS (Jan. 22, 2014), http://www.q4blog.com/2014/01/22/amo-survey-how-institutional-investors-worldwide-use-and-rate-social-media-us-findings/.

146. *Id*.

147. *Id*.

148. *Id*.

149. *About Us*, YELP, *supra* note 137.

has another 60,000+ new reviews each month.[150] There is no shortage of comments available to the investing public. Of the reviews posted to social media sites like Yelp or Angie's List, 75 percent are positive.[151] Positive reviews make nearly 75 percent of consumers trust the business more.[152] Before investing in a product, 70 percent of consumers consult reviews or ratings[153] and sixty-three percent of "consumers are more likely to purchase from a site if it has product ratings and reviews."[154] Prior to investing in a product, 60 percent of consumers conduct research for a week or more.[155] The reviews generated by social media are considered extremely valuable or valuable by 82 percent of consumers.[156]

Investors are using social media to connect, research, and read reviews, prior to making decisions. However, it is less clear how the financial industry is responding to the increasing use of social media by investors. The financial industry needs to understand what drives investors to social media before it can determine the best form of regulation to protect them from advisers' misleading or false advertisement statements.

Widespread access to the Internet through smartphones, tablets, and laptops means social media is always at your fingertips.[157] Increasingly, individuals are digitally savvy.[158] Today's consumer views social media "as an inherent skill and expects to be communicated to in such a fashion."[159] Naturally, social media is used to be social and to interact with friends and followers online.[160] The most active social media users have hundreds of friends and followers. They regularly post a variety of

150. *About Us*, ANGIE'S LIST, http://www.angieslist.com/aboutus.htm (last visited Oct. 12, 2014).

151. *The Review of Reviews*, PEOPLE CLAIM, http://www.peopleclaim.com/Default_V5.aspx#the-review-of-reviews (last visited Oct.11, 2012).

152. Sharon Epperson, *Is that online review site telling you the truth?*, CNBC (June 21, 2014, 4:00 PM), http://www.cnbc.com/id/101773290#.

153. *The Review of Reviews*, *supra* note 151.

154. *Id*.

155. *Id*.

156. *Id*.

157. Michael Veenswyk, *Why has the financial services sector been slow to adopt social?*, ECONSULTANCY (Feb. 26, 2014, 11:22 AM), https://econsultancy.com/blog/62215-why-has-the-financial-services-sector-been-slow-to-adopt-social#i.4qi1hk8pcfsp10.

158. *Id*.

159. *Id*.

160. Jayson DeMers, *7 Reasons You Need to Be Using Social Media As Your Customer Service Portal*, FORBES (Aug. 12, 2014, 12:59 PM), http://www.forbes.com/sites/jaysondemers/2014/08/12/7-reasons-you-need-to-be-using-social-media-as-your-customer-service-portal/.

information including pictures, reviews about a local restaurant, news articles, and their feelings.[161]

Social media sites are the new outlet for individuals wanting to express their satisfaction or dissatisfaction with products and services.[162] On average, American consumers tell "nine people about a good experience" with a product or service, and tell sixteen people about an unsatisfactory experience.[163] "When [consumers] are upset or need an answer[]…, they want a response [immediately]."[164] "They do not want to wait 24 hours for their e-mail to be…responded to" or even wait on hold for 30 minutes to get an answer.[165] Therefore, posting on social media is an easy, immediate, and very public way of being heard by both the targeted business and other consumers.[166] The transparency of their comments is a powerful message of their displeasure with a product or service.[167] Social media is a powerful tool to be used by a disgruntled consumer, in turn; it gives a consumer greater control and power.[168] Ultimately, "90 percent of unhappy clients will not do business with the same company again."[169]

It is no stretch then that investors' exhibit similar expectations and behavior on social media as the average consumer would. Currently, half of investors want to communicate with investment advisers "through social media but either can't find them there or assume that they don't use the medium."[170] That aside, it is indifferent whether the investment adviser has a social media platform or not. Third party social media sites can be used to post reviews. Investors can compare with the "same level of discerning and transparency that has long been available in other segments of the retail market – from restaurants to consumer electronics."[171] These sites are steadily becoming "ripe fo-

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161. *Id.*

162. Brandon Ancier, *3 Brands That Use Social Media in Customer Service to Boost Happiness*, TINT (May 11, 2014), http://www.tintup.com/blog/3-brands-that-use-social-media-in-customer-service-to-boost-happiness/.

163. *75 Customer Service Facts, Quotes & Statistics*, HELP SCOUT, http://www.helpscout.net/75-customer-service-facts-quotes-statistics/ (last visited Oct. 15, 2014).

164. DeMers, *supra* note 160.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *The Review of Reviews*, *supra* note 151.

170. Michelle A. Samaad, *SEC Approves Advisers' Use of Social Media Reviews*, CREDIT UNION TIMES (Apr. 9, 2014), http://www.cutimes.com/2014/04/09/sec-approves-advisers-use-of-social-media-reviews.

171. *Id.*

rums" through which investors screen investment advisers.[172] Because of content found on social media, up to 70 percent of investors reallocated investments or changed relationships.[173] This is consistent with the fact that almost 80 percent of individuals "trust online review sites as much as personal recommendations..."[174] The reviews provide 71 percent of consumers with comfort and assurance in the service.[175] Unsurprisingly, baby boomers trust online review sites less than younger consumers.[176] This is likely the result of "younger consumers who have grown up logging on, reading and valuing reviews."[177]

D. USE OF SOCIAL MEDIA BY INVESTMENT ADVISERS

No longer just a fad, social media is an influential force in society.[178] A growing number of investment advisers are using social media.[179] From just 2012 to 2013, the number of investment advisers using social media both personally and professional increased by nearly 10 percent.[180] Investment advisers understand the importance of social media as a business tool.[181] LinkedIn, Facebook, and Twitter are the most popular social media platforms utilized by investment advisers.[182]

The various social media platforms have transformed the way in which investment advisers can communicate with clients.[183] Investment advisers employ "social media to communicate with existing and potential clients, promote services, educate investors, and recruit new employees."[184] Using social media, investment advisers have the opportunity to engage in an interactive, multi-party conversation with clients and prospective clients, within a platform that is available for viewing by a third party.[185]

In using social media, investment advisers need to be cautious of various law and regulations, particularly anti-fraud provisions regard-

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172. Jacko, *supra* note 90, at 7.
173. Kasian-Lew, *supra* note 96.
174. Epperson, *supra* note 152.
175. *The Review of Reviews*, *supra* note 151.
176. Epperson, *supra* note 152.
177. *Id.*
178. JOHN G. BROWNING, SOCIAL MEDIA AND LITIGATION PRACTICE GUIDE 1 (2014).
179. *Advisers and Social media*, INVEST. NEWS 1, http://www.investmentnews.com/assets/docs/CI90361823.pdf, (last visited Sept. 27, 2014).
180. *Id.*
181. Sirinides, *supra* note 19.
182. *Advisers and Social media*, *supra* note 179.
183. NAT'L EXAM. RISK ALERT, *supra* note 14, at 1.
184. *Id.*
185. *Id.*

ing advertising, compliance, and recordkeeping.[186] The SEC will fine investment advisers who mislead investors through social media.[187] For example, the SEC charged Mark Grimaldi, a New York investment adviser, for "misleading investors through his publications and messages on Twitter."[188] In March 2011, he tweeted misleading statements like "'the April issue of the Money Navigator will give you an inside look of how I doubled the S&P500 the last 10 years.'"[189] As a result of Grimaldi using social media to advertise cherry picked information, he was fined $100,000.[190] He also entered an agreement to improve his marketing controls at the firm.[191]

Investment advisers' use of social media is not completely racked with regulatory violations and deficiencies. Despite widespread regulatory uncertainty among investment advisers,[192] some of the investment advisory firms blaze ahead using social media. These investment advisers are successfully navigating the delicate landscape of SEC regulations.

Although social media efforts have been ongoing since 2012, Morgan Stanley Wealth Management recently expanded its Twitter program for investment advisers.[193] Morgan Stanley proceeded with caution in expanding the program because of the "fast and public" nature of social media.[194] Now, an investment adviser, who has received training, is authorized to self-author tweets on a firm-approved account.[195] While tweets still require approval, they are no longer "canned" responses from a preapproved content library.[196] The self-authored content is approved within "a matter of hours," thus allowing for a real-time conversation.[197] The new program generated much excitement within the ranks, because advisers are "'able to participate in these conversations . . . [using] their own voice . . . to communicate in a timely manner.'"[198]

186. Mary Hodges, *Does your Firm Have a Social Media Policy?*, INVEST. ADVISER REP SYNDICATE (Aug. 12, 2014), http://www.investmentadviserrepsyndicate.com/does-your-firm-have-a-social-media-policy/.

187. Gioseffi & Perlow, *supra* note 23, at 1.

188. Matthias Rieker, *SEC Fines Investment Adviser Over Tweets*, THE WALL STREET JOURNAL (Jan. 30, 2014, 6:49 PM), http://online.wsj.com/news/articles/SB10001424052702303743604579353240026212338.

189. *Id*.

190. *Id*.

191. *Id*.

192. Sirinides, *supra* note 19.

193. Hanson, *supra* note 95.

194. *Id*.

195. *Id*.

196. *Id*.

197. *Id*.

198. *Id*.

Morgan Stanley is not alone in expanding its social media programs. Wells Fargo has a pilot Twitter program, which allows advisers to write their own tweets.[199]

E. NOW IS THE TIME TO EMBRACE SOCIAL MEDIA

1. Facing Reality

The proliferation of social media represents one of the most dramatic technological changes in communications since e-mail.[200] Social media has experienced astonishing growth with no sign of slowing down. The unprecedented growth of social media continues to outpace the development of SEC regulation regarding investment advisers' use of social media.[201]

By providing limited guidance addressing investment advisers' use of social media, the SEC is underestimating the tremendous power and advantages of social media. The SEC is leaving investors vulnerable to fraudsters using misleading advertisements. Legitimate investment advisers are too worried about regulatory deficiencies to join the social media conversation. The reality is that more individuals from "every demographic category in almost every corner of the world" are turning to social media to research and find resources.[202] The financial industry is not immune to the widespread adoption of social media.[203]

Conversations about the financial industry are happening on the various social media platforms.[204] Investors can currently find reviews of investment advisers' performance on social media sites, which, for better or worse, influence their financial behavior. The SEC can either permit or prohibit investment advisers to engage in these conversations and respond to reviews. However, the disadvantages of investment advisers remaining outside of the conversation will continue to increase for both investors and advisers.[205] Now is the time for the SEC to embrace social media. The radical changes in communication brought about by social media require the modernization of the SEC's regulatory framework; in particular there is a need to expand the current Testimonial Rule. As investors' social media expectations continue to grow, [206] so will their expectations that their investment advisers are using

199. Sirinides, *supra* note 19.
200. Veenswyk, *supra* note 157.
201. Kitces, *supra* note 86.
202. CHANDA & GIBBS, *supra* note 115, at 5.
203. *Id*.
204. *Id*.
205. *Id*.
206. Veenswyk, *supra* note 157.

social media.

2. Looking to Other Industries

Understanding the growth of social media usage in other industries provides a foundation for what investors expect from the financial industry. It also provides a framework for how the SEC's mission and goals can be accomplished and preserved in the wake of revolutionary changes in technology.

Whether the business is large or small, social media is likely an essential piece of a successful business strategy.[207] Increasingly, a company's sales and marketing groups are stressing the need to increase social media usage.[208] Social media is a cost effective way to "build a brand, obtain wider and faster distribution of news and information, and enhance search engine optimization (SEO) to effectively market products and services."[209] But most importantly, it is a way "to reach customers through interaction, networking, and solicitation efforts."[210] Customers and businesses have a much larger forum to voice opinions in real time.[211] Because businesses can instantaneously communicate with customers at any time, it is easy to maintain continuous contact with their customer base.[212] Furthermore, introductions and referrals to new clients are easier on social media platforms.[213] "Potential customers and consumers are looking for social media accounts that are smart and funny; they want accounts that are good conversationalists but will also actually listen to their needs."[214] In fact, "a business will not be considered relevant in the current economy if it fails to communicate where stakeholders – clients, investors, business partners, media and industry peers – are listening."[215]

Social media is more than just a tool for selling a product or service.[216] It is also about interacting with the customer to provide excellent customer service.[217] Social media platforms are replacing tradition-

207. Llya Pozin, *20 Companies You Should Be Following On Social Media*, FORBES (Mar. 6, 2014, 11:05 AM), http://www.forbes.com/sites/ilyapozin/2014/03/06/20-companies-you-should-be-following-on-social-media/.

208. Jacko, *supra* note 90, at 7.

209. *Id*.

210. *Id*.

211. Veenswyk, *supra* note 157.

212. Jacko, *supra* note 90, at 7.

213. *Id*.

214. Pozin, *supra* note 207.

215. Veenswyk, *supra* note 157.

216. Ancier, supra note 162.

217. *Id*.

al customer relationship management tools.[218] "For every customer who bothers to complain, 26 other customers remain silent."[219] And 90 percent of unsatisfied customers will not willingly do business with the company again.[220]

Thankfully, there are plenty of companies effectively and successfully using social media to build relationships with customers and improve their business.[221] For example, Starbucks uses social media to manage their customer service and reputation.[222] Millions of people visit Starbucks, one of the most popular coffee chains, every day.[223] Inevitably, the company receives negative comments and criticism on social media.[224] To combat negativity, in 2012, the company started utilizing their social media accounts to engage in one-on-one conversations with customers.[225] While the social media accounts welcome positive comments, it is also clearly dedicated to responding to criticism and disgruntled customers.[226] For example, on the Starbucks' Twitter page, a follower tweeted her frustration with not receiving the traditional free drink coupon on her birthday.[227] Starbucks promptly replied, "'@vickymaz Sorry to hear! Please call us at 1-800 -STARBUC. We promise we'll help you celebrate your birthday, even if it's a bit belated!'"[228] Rather than lose an upset or disappointed customer, Starbucks is acknowledging the problem and working quickly to provide a solution.[229] "Ninety-five percent of unhappy customers will return if an issue is resolved quickly and efficiently."[230] This is an incentive for businesses to act.

Furthermore, Starbucks has a social media account dedicated to receiving ideas from customers on how to make the entire experience better.[231] The premise of the account being that not only does Starbucks

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218. *Id.*

219. *75 Customer Service Facts, Quotes & Statistics*, *supra* note 163.

220. *The Review of Reviews*, *supra* note 151.

221. Pozin, *supra* note 207.

222. Ancier, supra note 162.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. Kylie Jane, *How Twitter Helps Starbucks Brew Up an Excellent Customer Experience*, CONTENTLY (Feb. 23, 2012), http://contently.com/strategist/2012/02/23/starbucks-twitter-strategy/.

228. *Id.*

229. *Id.*

230. *The Review of Reviews*, *supra* note 151 (emphasis added).

231. Ancier, supra note 162.

listen to its customers but also implements their ideas.[232] Starbucks has built up its customers' confidence by listening to their needs and taking the time to respond through social media.[233] Starbucks is actively engaging with disgruntled and happy customers through social media.

The healthcare industry is also actively engaging individuals on social media. However, unlike Starbucks, "healthcare providers are limited in the scope and methods they can use to reach their target audiences."[234] Healthcare providers, like the financial industry professionals, owe their patients a duty. [235] Physicians must exercise caution in responding on social media as not to jeopardize confidentiality obligations.[236] Physicians may respond to public commentary posted on independent social media sites like Yelp; however, they should not include "any kind of specifics regarding the patient's complaint; discussing the specifics of a patient's treatment or procedure could breach the physician's duty of confidentiality."[237] Instead, physicians should encourage disgruntled patients to contact the practice directly to resolve the problem.[238] This approach will create a public appearance that the physician is willing to work with patients, even those leaving negative remarks, yet still maintain confidentiality, and avoids malpractice exposure.[239] Therefore, like the Starbuck approach, this practice ensures it "does not appear rude or dismissive of the patient's concerns."[240] Furthermore, prominent physician and social media blogger Kevin Pho, M.D. states that physicians should be proactive, and "provide clear instructions to patients on how to rate the physician positively on web sites."[241] Ultimately, it is important to note that the healthcare industry is allowed to respond and even encourage patients to positively com-

232. Jane, *supra* note 227.

233. *Id*.

234. Suzanne D. Nolan et al., *Health Care Marketing: A Tricky Operation*, 34 HEALTH LAWYER, Oct. 2012, at 34, *available at* http://heinonline.org/HOL/Page?handle=hein.journals/healaw25&div=7&g_sent=1&collection=journals.

235. 42 U.S.C.A. § 1320d-6 (2010); Eric Goldman, *How Doctors Should Respond to Negative Online Reviews*, FORBES (Nov. 21, 2013, 11:54 AM), http://www.forbes.com/sites/ericgoldman/2013/11/21/how-doctors-should-respond-to-negative-online-reviews/.

236. 42 U.S.C.A. § 1320d-6 (2010); Goldman, *supra* note 235.

237. DANIEL F. SHAY, *Chapter 2. Physicians and Social Media: Untangling the Web, in* 2014 HEALTH L. HANDBOOK 15 (Alice G. Gosfield ed., 2014).

238. *Id*.

239. *Id*.

240. *Id*. at 16.

241. *Id.*; Kevin Pho, M.D., *Dealing with a Negative Online Review on a Physician Rating Site*, KEVINMD (May 3, 2011), http://www.kevinmd.com/blog/2011/05/dealing-negative-online-review-physician-rating-site.html.

ment on social media. How is the SEC and financial industry going to respond to the increasing use of social media to post reviews about investment advisers?

Compared with other industries, the financial industry is trailing in its adoption of social media.[242] "Recognizing the increased use of social media and the Internet to research and diligence service providers," the SEC issued a long-awaited guidance on investment advisers' use of social media.[243] The 2014 Guidance sought "to help advisers apply Section 206(4) of the . . . 'Advisers Act' and Rule 206(4)-1(a)(1) . . . '[T]estimonial [R]ule' . . . to their use of social media testimonials from independent third parties."[244] However, the current climate of regulation hinders the potentially revolutionary uses of social media on adviser-client communications.

3. Time for Modernization

Under the current guidance, investment advisers activate the Testimonial Rule if they attempt to exhort any control over third party social media review sites, including deleting, editing, or changing a review.[245] Furthermore, the rule suggests that an investment adviser is prohibited from responding to a complaint directly.[246] In the age of social media, these antiquated SEC regulations are stifling the growth of investment advisers' use of social media. A proposed expansion of the Testimonial Rule would benefit both investors and investment advisers. At its core, "the industry is built on [a] relationship nurtured over time through trust-building interactions."[247] There is no reason to limit a relationship that could flourish through interactive, real-time response on social media. The benefits of investment advisers fully and effectively using social media platforms are considerable.

This proposal seeks to modify the language set forth in the 2014 Guidance to make it more progressive. Furthermore, the proposal respectfully employs the legislature to codify it. Language I propose adding to the guidance is underlined while language think should be removed, is struck through. The proposed changes to the Testimonial Rule are that:

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242. Veenswyk, *supra* note 157.

243. ANASTASIA T. ROCKAS, ET AL., SEC ISSUES NEW GUIDANCE FOR INVESTMENT ADVISERS REGARDING USE OF SOCIAL MEDIA TESTIMONIALS 1 (May 20, 2014), *available at* http://www.skadden.com/sites/default/files/publications/SEC_Issues_New_Guidance_for_Investment_Advisers.pdf.

244. *Id*.

245. Kitces, *supra* note 86.

246. *My Adviser Randy*, *supra* note 81.

247. Gioseffi & Perlow, *supra* note 23, at 3.

> ~~May a~~ An investment adviser or investment advisory representative ("IAR") may publish all the same public commentary on its own internet or social media site, if it comes from an independent social media site~~?~~ and:
>
> ~~A2.~~ 1) the ~~When an~~ investment adviser or IAR has no ability to affect which public commentary is included or how the public commentary is presented on an independent social media site; 2) where the commentators' ability to include the public commentary is not restricted; and 3) where the independent social media site allows for the viewing of all public commentary and updating of new commentary on a real-time basis, the concerns underlying the testimonial prohibition will ~~may~~ not be implicated. As long as the above conditions are met by the investment adviser or IAR, they may
>
> ~~As described in more depth below, publication of public commentary from an independent social media site would not raise any of the dangers that rule 206(4)-1(a) (1) was designed to prevent if:~~
>
> ~~the independent social media site provides content that is independent of the investment adviser or IAR;~~
>
> ~~there is no material connection between the independent social media site and the investment adviser or IAR that would call into question the independence of the independent social media site or commentary; and~~
>
> ~~the investment adviser or IAR publishes all of the unedited comments appearing on the independent social media site regarding the investment adviser or IAR.14~~
>
> ~~Under these circumstances, an investment adviser or IAR may include such public commentary in an advertisement without implicating the concerns underlying the testimonial rule.~~
>
> If, however, the investment adviser or IAR drafts or respond and submits commentary that is included on the independent social media site., the testimonial rule generally would be implicated. Also, Furthermore, investment advisers or IAR are permitted to invite clients to post explicit or implicit statements of their experience or endorsement on only an independent, third party social media site. However, if the investment adviser or IAR is allowed to suppress the publication of all or a portion of the commentary, edit the client's commentary or is able to organize or prioritize the order in which the commentary is presented, the testimonial rule generally would be implicated.[248]

The SEC should be bold and expand the limits of the Testimonial Rule for investment advisers' use of social media. Under the proposed rule, if an investment adviser advertises public commentary from a third party site, the adviser is permitted to respond to investors' re-

248. DIV. OF INVEST. MGMT, US. SEC. AND EXCH. COMM'N, *supra* note 20, at 3-4.

views and comments on that particular third party site. Responding to social media sites can be done without jeopardizing the integrity of the SEC to protect investors. The proposed expansion of this rule would balance the investment advisers' desire to utilize social media but also preserve the SEC's mission to protect investors. Utilizing social media as an interactive platform has enormous potential for both investors and advisers.

Just as social media is being leveraged by businesses for customer service, investment advisers should use it to manage and forge meaningful client relationships. Investment advisers can use social media to understand the needs and wants of their current clients. A recent survey demonstrated that while investment advisers believed they knew what their clients wanted, the results from the clients' research showed otherwise.[249] Investment advisers can use the critiques on social media to further develop their business and relationships. Social media could be "an invaluable tool" to bridge the gap between what investment advisers think they know about their client's goals and what their client's goals actually are. [250] There is great value for both the investor and investment adviser in allowing third party social media sites to be an interactive medium for building relationships.

Currently, investment advisers are prohibited from inviting clients to post "explicit or implicit statement[s]" about their experience or endorsement on social media sites[251] but; investment advisers should be able to invite and welcome positive comments. Allowing such behavior would not compromise the SEC's mission to protect investors from the mistaken inference that the experience of the person authoring the testimonial is typical of every client's experience. The reality is that people are more likely to see negative comments and reviews than positive ones. An unsatisfactory experience reaches more than twice as many people as praise for a good service.[252] Furthermore, "over 1 million people view tweets about the customer experience every week."[253] Approximately, "80 percent of those tweets are negative or critical in nature."[254] By responding to a positive comment, the investment adviser is validating the time and effort the investors went through to post a positive comment. The validation builds trust and encourages communication between the investment adviser and the investor.

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249. Cyril Tuohy, *SEC Issues Guidance On Testimonial Rule*, INSURANCENEWSNET (Apr. 21, 2014), http://insurancenewsnet.com/innarticle/2014/04/21/sec-issues-guidance-on-testimonial-rule-a-492484.html#.VD8HWfldX-s.

250. *Id.*

251. DIV. OF INVEST. MGMT, US. SEC. AND EXCH. COMM'N, *supra* note 20, at 3.

252. *75 Customer Service Facts, Quotes & Statistics*, *supra* note 163.

253. *Id.*

254. *Id.*

Even more important than responding to positive comments is having an investment adviser address negative or critical reviews. How an investment adviser responds to negative comments is significant for a number of reasons. If an investment adviser takes the time to thoughtfully remedy the disgruntled client's complaint, they will likely keep their client's business.[255] The transparency of the conversation between a disappointed client and the investment adviser on social media is also a potentially effective advertising tool for soliciting new clients. Prospective clients can observe how an investment adviser handles conflicts and dissatisfaction.[256] Reviewing the interactions and dialogues on the third party site can become a vetting process for a potential client, thus saving their time and efforts.[257] A quick and effective solution to a disgruntled client's problem on social media means the investment adviser leaves all the followers and reviewers with a good feeling and confidence in the services. While increasing visibility of their brand, investment advisers are creating substantial and personal relationship with clients.[258]

More imperative than how an expansion of the Testimonial Rule benefits investment advisers is how the bold new rule would benefit investors. "Social media has fundamentally changed the consumer decision journey."[259] It is an easy and convenient platform to open a dialogue[260] between disappointed clients and their investment advisers. Two things are happening when an investment adviser responds to negative reviews. First, the investment adviser is hopefully doing everything in their power to resolve the problem. Under the current rule, there is a greater chance that the investment adviser will never see nor work to resolve the problem and, as a result the investor's problem is going unaddressed. Under the proposed rule, the client and investment adviser can work together to remedy the problem. Second, even if the investment adviser loses an unsatisfied client, the review is an opportunity to learn from mistakes and be better for the next client. In order to be a successful investment adviser, the advisers have to be open to suggestions from clients and must "always be seeking out ways to im-

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255. *The Review of Reviews*, *supra* note 151.

256. DeMers, *supra* note 160.

257. Jacko, *supra* note 90, at 8.

258. DeMers, *supra* note 160.

259. Heather Traeger & Kris Easter, *Use of Social Media in Private Fund Offerings: Perks, Perils, and Privacy*, 13 J. BUS. & SEC. L. 143, 179 (2013) (quoting *State of the Media: The Social Media Report 2012*, NIELSON, http://www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2012-Reports/The-Social-Media-Report-2012.pdf).

260. BARBIER, *supra* note 138, at 1.

prove."[261] Third, the transparency of the unfiltered voices means the investment advisers is accountable in a very public way. The criticism and subsequent response, or lack-thereof, is a reflection of his services and business practices, and this exchange may influence a potential clients' decision to engage the services of the advisers.

However, to preserve the integrity of the SEC's mission[262] there will need to be safeguards for the proposed rule to allow investment advisers to respond to reviews and comments on third party social media sites. For example, the proposed rule strictly prohibits investment advisers from editing or deleting client comments or reviews. The public needs to be able to see all comments, good and bad, in there totality. This is consistent with the 2014 Guidance, which prohibits investment advisers from suppressing or editing commentary.[263] An investment adviser should have no ability to affect the comments or reviews on a social media site, including reorganizing or prioritizing the order of the comments.

These parameters are necessary to prevent investment advisers from misleading investors. The proposed rules strengthen the relationship between an investor and investment adviser. Therefore, any investment adviser using dubious tactics like editing, deleting, and reorganizing critical reviews should be punished. The transparency of the investor's unfiltered voice provides a safeguard against misleading tactics. Editing or deleting a comment would seriously alter the transparency and accuracy of the comments. These techniques undermine the implicit trustworthiness and transparency of comments on social media. As a result, they are misleading investors by portraying positive reviews as the typical experience. Investment advisers using these dishonest tactics would be violating their duty to full and fair disclosure.

IV. CONCLUSION

The SEC can no longer bury its head in the sand as social media is permeates the financial industry.[264] The widespread adoption of social media[265] by investors is increasingly informing their financial decisions.[266] Furthermore, the culture of social media and its use by other industries is shaping the expectations of investors. More investors want to communicate with their advisers on social media and investigate them using social media review sites. As investors' social media expectations

261. Jane, *supra* note 227.
262. HAAS & HOWARD, *supra* note 34, at 128.
263. DIV. OF INVEST. MGMT, US. SEC. AND EXCH. COMM'N, *supra* note 20, at 4.
264. NAT'L EXAM. RISK ALERT, *supra* note 14, at 1.
265. *Social Networking Fact Sheet, supra* note 12.
266. SEC Charges Illinois-Based Adviser in Social Media Scam, *supra* note 7.

continue to escalate, so will their expectations of their investment adviser's social media presence.[267]

Although eager to fully leverage social media, investment advisers find that uncertainty over compliance is their biggest obstacle.[268] The SEC has provided limited guidance addressing the use of social media by investment advisers.[269] According to the 2014 Guidance, advertisements with client comments do not violate the Testimonial Rule if they are from an independent third party site, such as Yelp or Angie's List.[270] However, the investment adviser cannot have control or influence over the third party reviews, thus no editing, deleting, or responding to a comment.[271] The rationale for prohibiting testimonials is that they "may give rise to a fraudulent or deceptive implication, or mistaken inference, that the experience of the person giving the testimonial is typical of the experience of [all of] the adviser's clients."[272]

While the advantage to the current guidance is that it provides a flexible test, it is too fluid for investment advisers to actually implement strategic social media plans. The status quo is lack-luster in the current fast-paced social media environment. These antiquated SEC regulations are stifling the growth of investment advisers' use of social media.[273] Rather than continue with this conservative approach, the SEC should implement a progressive and modern regulatory framework. In particular need of expansion and clarification is the Testimonial Rule.

If an investment adviser advertises public commentary from a third party site, the adviser should be permitted to respond to investors' reviews and comments, both negative and positive, on that particular site. However, the proposed expansion of the Testimonial Rule would have safeguards, including a strict prohibition from editing, deleting, or reorganizing reviews. These safeguards ensure the integrity of the SEC's mission to protect investors from fraudulent and misleading advertisements. The proposed rule would balance the desire of investment advisers wanting to embrace social media while also preserving the SEC's mission to protect investors.

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267. Veenswyk, *supra* note 157.

268. Sirinides, *supra* note 19.

269. Stadulis, A STEP-BY-STEP GUIDE TO COMPLIANCE AND THE LAW, *supra* note 6, 60-6.

270. Schoeff, *supra* note 77.

271. *Id*.

272. Kitces, *supra* note 86.

273. Baris, *supra* note 46.