

The Perils and Possibilities of Social Media for Financial Services Companies

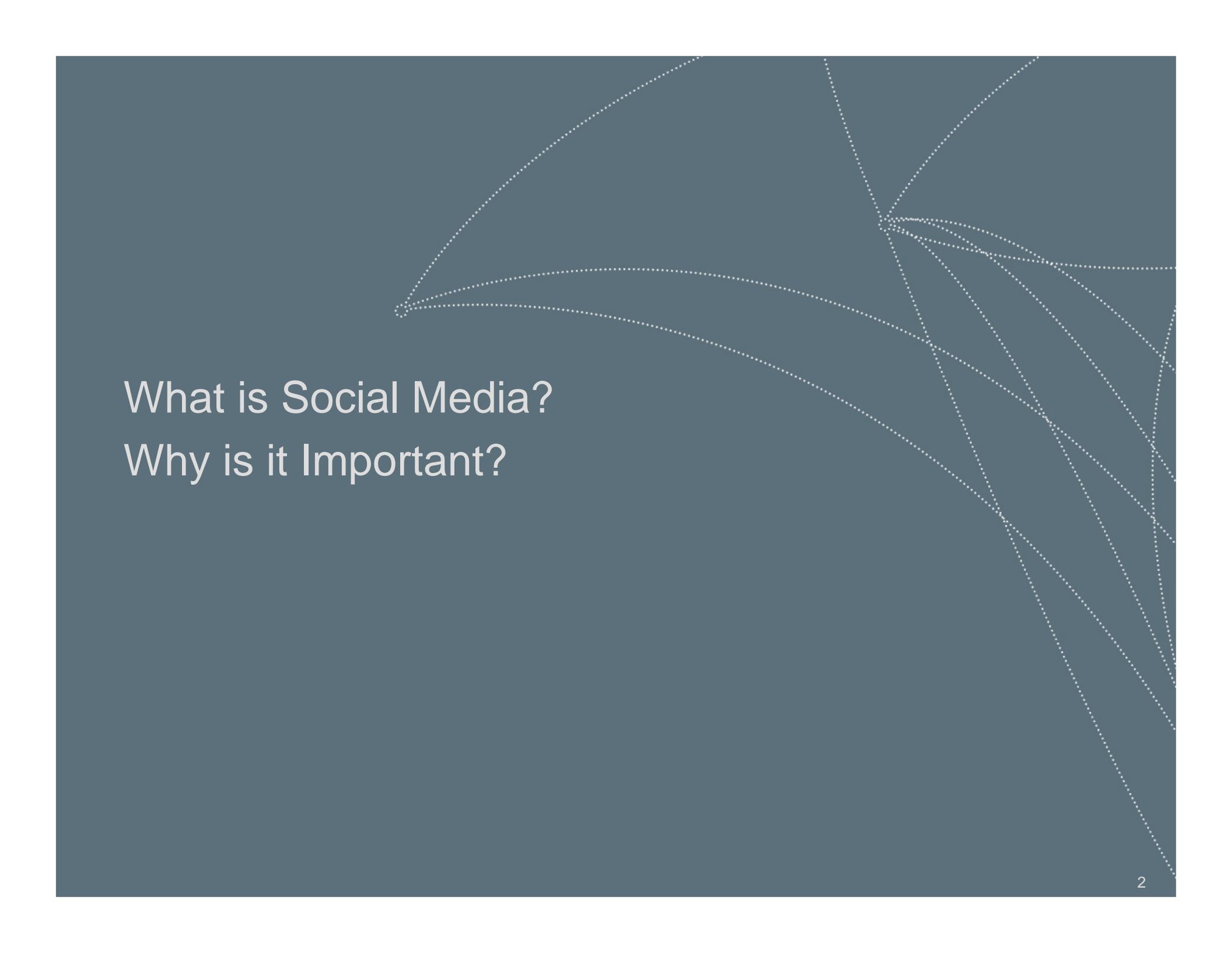
Webinar

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Introduction/Overview

- I. What is Social Media and Why is it Important?
- II. Legal Framework and Regulatory Guidance on Social Media
- III. Third-Party Posts and Content
- IV. Privacy and Information Security Concerns
- V. Drafting Social Media Policies

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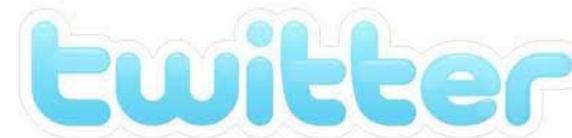
What is Social Media?
Why is it Important?

From SEC National Exam Risk Alert

“Social Media is an umbrella term that encompasses various activities that integrate technology, social interaction and content creation. Social media may use many technologies, including, but not limited to, blogs, microblogs, wikis, photos and video sharing, podcasts, social networking and virtual worlds.”

“Social Media is landscape-shifting. It converts the traditional two-party, adviser-to-client communication into an interactive, multi-party dialogue among advisers, clients, prospects, within an open architecture accessible to third-party observers. It also converts a static medium, such as a website, where viewers passively receive content, into a medium where users actively create content.”

Most common sites used in financial services industry



Common Uses of Social Media

- Marketing
- Expanding brand awareness
- Promoting firm's website
- Building customer loyalty
- Connecting with clients and potential clients
- Educating clients/potential clients
- Servicing clients
- Customer/market research

Common Questions for Financial Services Firms

- What is the purpose for which my firm wants to use social media?
- What are the associated benefits and risks?
- What regulations are implicated, such as advertising or recordkeeping requirements?
- What type of pre-approval, supervision and monitoring of content will be required?
- Who can represent the firm using social media?
- Should we allow third-party postings on our site?
- When will content posted by clients or other third parties on social media be attributed to my firm (i.e., when will the firm be responsible for the content)?
- What are the risks of third-party content being attributed to my firm and what additional regulations apply, such as those relating to privacy or testimonials?
- What kinds of communication are appropriate for the public domain?



Legal Framework and Regulatory Guidance

Central Challenge:
Applying old standards to new technology

Investment Management Firms: Federal Securities Laws and SEC/NASD Rules Applicable to Investment Advisers, Broker-Dealers, Investment Companies

- **Anti-Fraud Provisions:**

Section 206 of the Investment Advisers Act, Section 17(a) of the '33 Act, Section 10(b) and Rule 10b-5 under the '34 Act, Section 34(b) of the Investment Company Act and NASD Rule 2210

- **Advertising Rules:**

Rule 206(4)-1 under the Investment Advisers Act, NASD Rule 2210, '33 Act Rules 482 and 156 and Rule 34b-1 under the Investment Company Act

- **Compliance/Supervision Rules:**

Rule 206(4)-7 under the Investment Advisers Act and Rule 38a-1 under the Investment Company Act, NASD Rule 3010

- **Recordkeeping Rules:**

Rule 204-2 under the Investment Advisers Act of 1940, '34 Act Rules 17a-3 and 17a-4, and NASD Rules 2210, 2211, 3010, FINRA Rule 4511 and Section 31 and Rule 31a-2 under the Investment Company Act

- **Suitability:** NASD Rule 2310

- **Private Offerings:** Reg D 502(c)

Consumer Finance Companies: Federal and State Regulation of Advertising and Marketing Activities

▪ FTC Act / UDAAP

- 15 U.S.C. § 45 (Section 5 of the FTC Act)
- Section 1031 of the Dodd-Frank Act
- FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising (16 C.F.R. Part 255)
- FTC/CFPB Mortgage Advertising Practices Rule

▪ Advertising:

- Truth-in-Lending Act advertising rules
- State licensing disclosures and advertising restrictions
- Interagency Guidance on Nontraditional Mortgage Product Risks
- HUD advertising regulations
- RESPA Section 8
- Lanham Act

▪ Recordkeeping/Discovery:

- State licensing statutes and regulations
- Regulations issued by federal functional regulators
- Mortgage Advertising Practices Rule
- Federal/state rules of civil procedure

Consumer Finance Companies: Federal and State Regulation of Advertising and Marketing Activities (continued)

- **Anti-Discrimination:**

- Fair Housing Act
- Equal Credit Opportunity Act
- State anti-discrimination laws

- **Miscellaneous:**

- Lottery, sweepstakes, and sellers of travel laws
- Fair Credit Reporting Act (e.g., direct dispute regulations)
- Other complaint resolution requirements

General: UDAAP

- Section 5 of FTC Act prohibits unfair or deceptive acts or practices
- Dodd-Frank (Sec. 1031): The Bureau may prevent a covered person or service provider from committing or engaging in unfair, deceptive, or abusive acts or practices
 - Unfair: the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers and such substantial injury is not outweighed by countervailing benefits to consumers or to competition
 - Abusive: (i) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or (ii) takes unreasonable advantage of (a) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service; (b) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or (c) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer
 - Deceptive: (i) there is a representation, omission of information, or practice that is likely to mislead consumers acting reasonably under the circumstances; and (ii) that representation, omission, or practice is material to consumers.

General: IAA Rule 206(4)-1

Is the communication an “advertisement” under Rule 206(4)-1 under the Investment Advisers Act? If no, then confirm the general anti-fraud provisions. If yes, then must also consider the five prohibitions under the Rule:

- Testimonials;
- Past specific recommendations;
- Graphs, charts and formulas;
- Free reports and services; and
- Untrue statements of material fact.

SEC OCIE National Examination Risk Alert, *Investment Adviser Use of Social Media, January 2012*

Key Points from SEC Guidance:

- SEC exam staff expects to see policies and procedures specific to use of social media (not just advertising or electronic communications).
 - No similar specific requirement for non-SEC regulated institutions, but many of the principles articulated in the guidance would be equally appropriate outside of the investment management context.

- Policies and procedures should address federal securities laws and regulations, including those relating to antifraud, compliance and recordkeeping provisions.

- Policies and procedures should specify what types of social media activity are permitted and what is prohibited (specific sites, features).

- Policies and procedures should be tailored to the profile of the specific firm and its operations and the way it plans to use social media.

SEC National Examination Risk Alert (continued)

Factors in Evaluating Effectiveness of Policies and Procedures:

- *Usage guidelines* – provide guidance on appropriate use of social media and appropriate restrictions/prohibitions based on analysis of risk to the firm and its clients.
- *Content standards* – does content implicate fiduciary duties or other regulatory issues (e.g., recommendations, performance)?
- *Monitoring* – consider ability to monitor use of third-party sites/question of access (e.g., “friend” compliance personnel).
- *Frequency of monitoring* – mentions “risk-based” approach – may depend on volume and pace of communications, subject matter, probability to mislead.
- *Pre-approval of content* – consider whether pre-approval should be implemented (even where not required by law).

SEC National Examination Risk Alert (continued)

Factors in Evaluating Effectiveness of Policies and Procedures (cont.):

- *Firm resources* – sufficient resources to adequately monitor? Use of conversation monitoring by outside vendors/lexicon-based searches.
- *Criteria for approving participation* – consider social media site’s reputation, privacy policy, ability to remove third-party posts, controls on anonymous posting and advertising practices of site.
- *Training* – implement training to promote compliance with policies and procedures and prevent legal violations.
- *Certification* – consider requiring reps to certify that they understand and are complying with the firm’s policies and procedures.
- *Functionality* – consider functionality of each approved site, address any upgrades/modifications to features that affect risk exposure to the firm and its clients.

SEC National Examination Risk Alert (continued)

Factors in Evaluating Effectiveness of Policies and Procedures (cont.)

- *Personal/Professional sites* – may choose to specify what types of firm communications are permitted on a site not operated or supervised by the firm (e.g., business card information).
- *Information security* – does use of social media site pose information security risks? Consider use of firewalls between customer information and firm’s proprietary information, and social media site.
- *Enterprise-wide sites* – advisers that are part of a large financial services enterprise may consider whether to create usage guidelines reasonably designed to prevent the advertising practices of a “firm-wide” social media site from violations of the Investment Advisers Act.
- *Third-party postings* – what types of postings are permissible?

SEC National Examination Risk Alert (continued)

Rule 204-2 and Recordkeeping

- Records relating to firm's "advisory business" must be kept.
- Will records be kept in paper or electronic format? If kept in electronic format, must be arranged and indexed to promote easy access.
- Conduct employee training regarding required records and conduct periodic test checking to make sure employees aren't destroying required records.
- Consider use of third-party vendors to keep records.

FINRA Guidance

- FINRA Regulatory Notice 10-06 (Jan. 2010) – *Guidance on Blogs and Social Networking Web Sites*
- FINRA Regulatory Notice 11-39 (Aug. 2011) – *Social Media Websites and the Use of Personal Devices for Business Communications*
- FINRA Regulatory Notice 07-59 (Dec. 2007) – *Supervision of Electronic Communications*

Key Topics from FINRA Guidance

- Recordkeeping
- Suitability
- Prior Approval vs. Supervision
 - Static vs. Interactive Content
- Third-Party Posts (see next section)

Recordkeeping under '34 Act and NASD/FINRA Rules

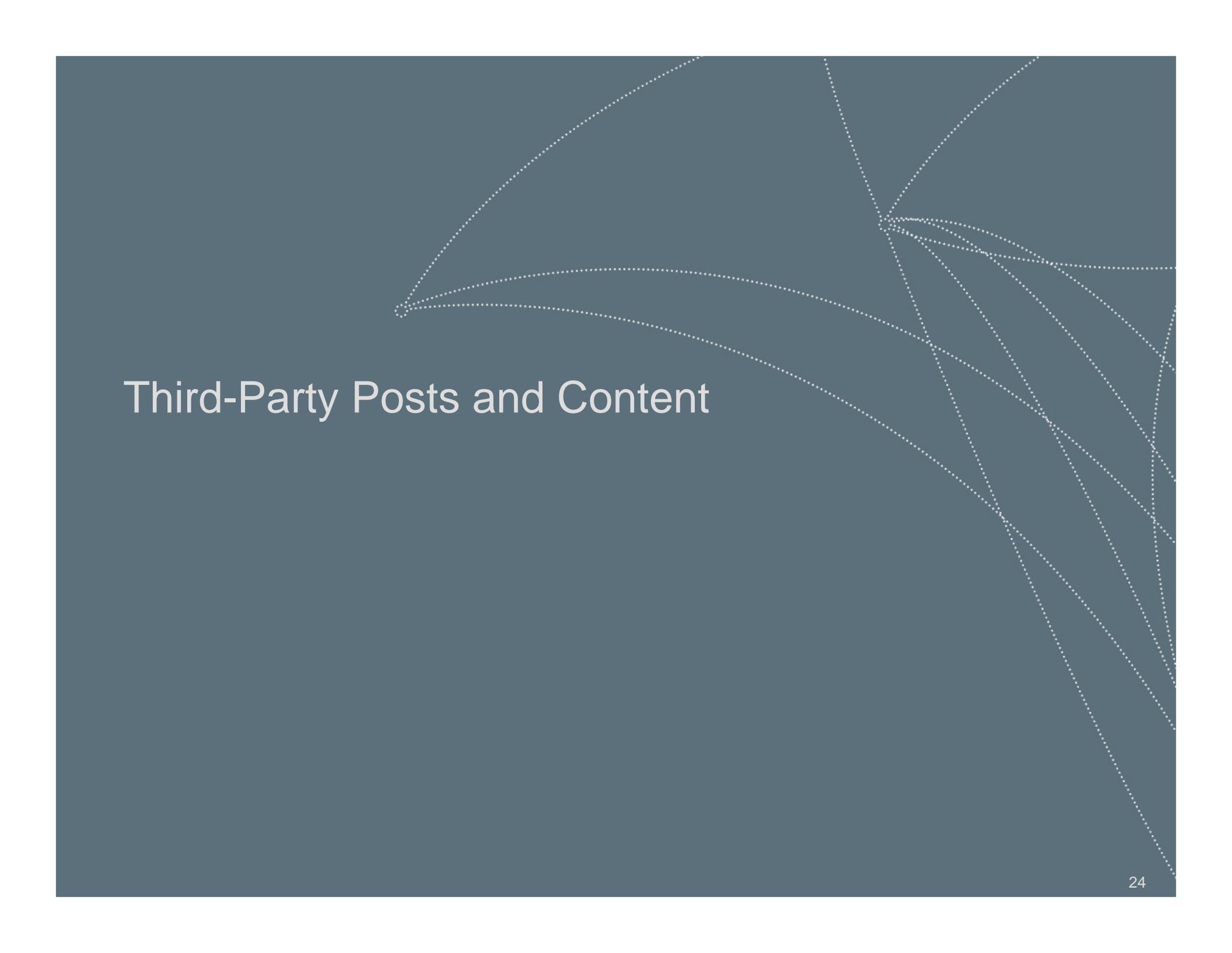
- Ensure first that you can retain records before allowing social media use.
- Content of the communication is determinative – must retain communications sent or received by firm or its associated persons that relate to broker-dealer’s “business as such.”
- Does not matter if employee sends a communication using a “personal” device – still subject to business as such standard.
- Includes third-party posts – rules require retention of records of communications received by firm or its associated persons relating to its business as such.

Suitability – NASD Rule 2310

- The recommendation of a security or specific investment product through a social media site can trigger “suitability” requirements.
- A recommendation must be suitable for every investor to whom it is made.
- Best practice to require pre-approval by a registered principal of any recommendations of a specific investment product.
- Some firms prohibit references to specific investment products due to these issues.

Prior Approval vs. Supervision – Rule 2210

- Static vs. Interactive Communications
 - While not expressly adopted by other regulators, may be a useful distinction for consumer finance companies as well.
- Static content is an “advertisement” and must be pre-approved by a registered principal (e.g., LinkedIn profile).
- Interactive content is considered a “public appearance” and must be subject to reasonable post-use supervision which may be risk-based (Note: proposed rule, “retail communication”).
- Interactive content may become static (e.g., re-posting) and therefore require pre-approval.
- Recordkeeping requirements are the same for static and interactive communications.

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Third-Party Posts and Content

Testimonials and Endorsements

FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising

- Endorsements must reflect “the honest opinions, findings, belief or experience of the endorser.”
- An individual or company making an endorsement or testimonial must disclose any material connection between the endorser and the company.
- If a testimonial or endorsement does not contain specific substantiation of typical product results, the posting must clearly and conspicuously disclose the generally expected performance in the depicted circumstances.

Testimonials and Endorsements (continued)

FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising

- “New media” analysis: the “fundamental question is whether, viewed objectively, the relationship between the advertiser and the speaker is such that the speaker’s statement can be considered ‘sponsored’ by the advertiser and therefore an ‘advertising message.’”
 - Control is not dispositive.
 - Factors include:
 - whether the speaker is compensated by the advertiser or its agent;
 - whether the product or service in question was provided for free by the advertiser;
 - the terms of any agreement;
 - the length of the relationship;
 - the previous receipt of products or services; and
 - the value of the items or services received.

Testimonials and Endorsements (continued)

Is a third-party post a “testimonial” prohibited by Rule 206(4)-1 under the Investment Advisers Act?

- Explicit or implicit statement of a client’s experience with, or endorsement of, an investment adviser
- SEC Risk Alert: Social “plug-ins,” Facebook Likes and LinkedIn Recommendations *could* be testimonials depending on facts and circumstances
- Massachusetts Securities Division

Adoption and Entanglement Theories

Attribution of third-party content is a key concern, because attribution may cause the content to become subject to a variety of requirements (licensing, disclosures and other content-based requirements, pre-approval or review, etc.)

- Under FINRA guidance, third-party content is generally not attributed to the firm, unless the firm:
 - “adopts” it by explicitly or implicitly endorsing or approving the content (e.g., depending on context, could be ‘Like’ or ‘retweet’); or
 - is “entangled” with the content by involving itself in the preparation of the content (e.g., firm pays for an industry study).
- Links to third-party sites:
 - SEC has employed adoption and entanglement theories in the context of a company’s responsibility for third-party information that is hyperlinked to its Website.
 - Firm can’t know or have reason to know that the site contains false or misleading information.
- Recordkeeping requirements may still apply to third-party content even if content is not attributed to the firm.

Commenting Guidelines

- No personal information or information about your accounts.
- No testimonials about how well you've done by investing with the firm.
- No investment advice or recommendations about specific stocks or funds.
- No attacks on the firm or fellow viewers.
- No offensive or defamatory comments.
- No illegal information, such as material, non-public information. [Insider Trading]
- No customer-service related questions. Contact us directly.
- Read [insert name of third-party social media site's] terms of service and privacy policy, as they apply to your communications through our page/account.

Disclaimers

- Firm is not affiliated with [insert name of third-party social media site]. Use at your own risk.
- Firm is not responsible for and does not endorse any content, advertising, advice, opinions, recommendations or other information from third parties, including the social media site.
- Opinions, comments expressed by [friends or followers] are those of the persons submitting them and do not represent the views of the firm or its management.
- We do not endorse or approve content submitted by third parties, or endorse individuals or organizations, by using any features on this site.
- We reserve the right to block any third-party content deemed illegal, inappropriate or offensive.
- We may block any posts that are testimonials, advice, recommendations, advertisements for specific products or services.

Ownership and Control

When does a social media account belong to a company or become subject to company control?

- ***PhoneDog v. Kravitz***, 3:2011cv03474 (N.D. Cal. July 15, 2011).
 - Technology review company asked its employees to use Twitter accounts to drive traffic to its website. Defendant eventually accumulated 17,000 followers to such an account. Unclear whether account was registered by company or defendant. In accordance with company guidelines, however, the account was registered originally under a username that suggested that the employee was tweeting on behalf of the company. Defendant continued using the Twitter account after he left the company, although he changed the username to disassociate his tweets from the company.
 - Ownership of Twitter account remains disputed. Company seeks damages for the alleged misappropriation of trade secrets (*i.e.*, the account password), interference with the company's economic relationships, and wrongful conversion.
 - Demonstrates trade-off between giving autonomy to employees and retaining control over accounts and content.

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Privacy and Information Security Concerns

Privacy and Information Security

- Legal Framework
 - Gramm-Leach-Bliley Act (Privacy Rule and Safeguards Rule)
 - Fair Credit Reporting Act
 - State financial privacy requirements (*e.g.*, California and Vermont)
 - State information security requirements (*e.g.*, Massachusetts information security regulations; state SSN protection requirements)
 - Security incident response requirements

Privacy and Information Security – Key Considerations

- Might personal information be communicated over social media platforms?
 - Consider what information might be viewed or inferred by other users – e.g., existence of financial relationship
 - Remember that information might be communicated among users, from user to financial institution, or from institution to user(s)

- Is disclosure of personal information to affiliated or non-affiliated third parties necessary for operation of site, program, or promotion?
 - If so, is such use consistent with GLBA privacy notices?
 - Must consumer opt-out rights be observed or do exceptions apply?

Privacy and Information Security – Key Considerations (continued)

- Is “in-app” information stored securely and in accordance with federal/state requirements and industry standards?
- Can users access account information and/or company servers?
 - Consider user identification, authentication, permissions, password standards, access limitations, etc.
- Is site monitored by IT department or others to detect security incidents, communication of confidential/sensitive information, intrusion attempts, etc.?
 - Is particular content monitored or scrubbed? Is doing so consistent with desired level of company supervision and control?

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Drafting Social Media Policies

Key Takeaways in Drafting Social Media Policies

- Identify business purposes for which firm wants to use social media, identify risks and draft procedures around purposes and risks.
- Perform cost-benefit analysis and identify resources available.
- Coordinate legal/compliance, IT, privacy departments on enterprise-wide basis to ensure policy addresses applicable laws.
- Be specific about permitted or prohibited sites and permitted/prohibited features of those sites, and who can represent the firm.
- Specify account ownership, particularly for accounts used mostly for business purposes.
- Monitor changes to features/settings on permitted sites and modify policy, as appropriate.
- Incorporate regular training and education into policy.

Key Takeaways in Drafting Social Media Policies (continued)

- Organize and identify the process for pre-approving required content and monitoring interactive content/consider live monitoring.
- Make sure employees separate business and personal accounts.
- Establish the extent to which personal use is permitted during business hours.
- Identify inappropriate personal uses of social media (e.g., defamatory or illegal content, disparagement of competitors, use of company logo or other suggestions of endorsement, etc.).
- Consider issues related to personal devices (e.g., monitoring, recordkeeping, unauthorized access, ability to separate business and personal communications).
- Monitor whether employee usage complies with policies and procedures and consider employee certifications.
- If budget permits, use vendors for monitoring, site-blocking, and recordkeeping.

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New SAFE Act Examination Guidelines for State Regulated Entities: Spring Cleaning May Be Required

By K&L Gates on March 12th, 2012
Posted in [Mortgage Lending](#)

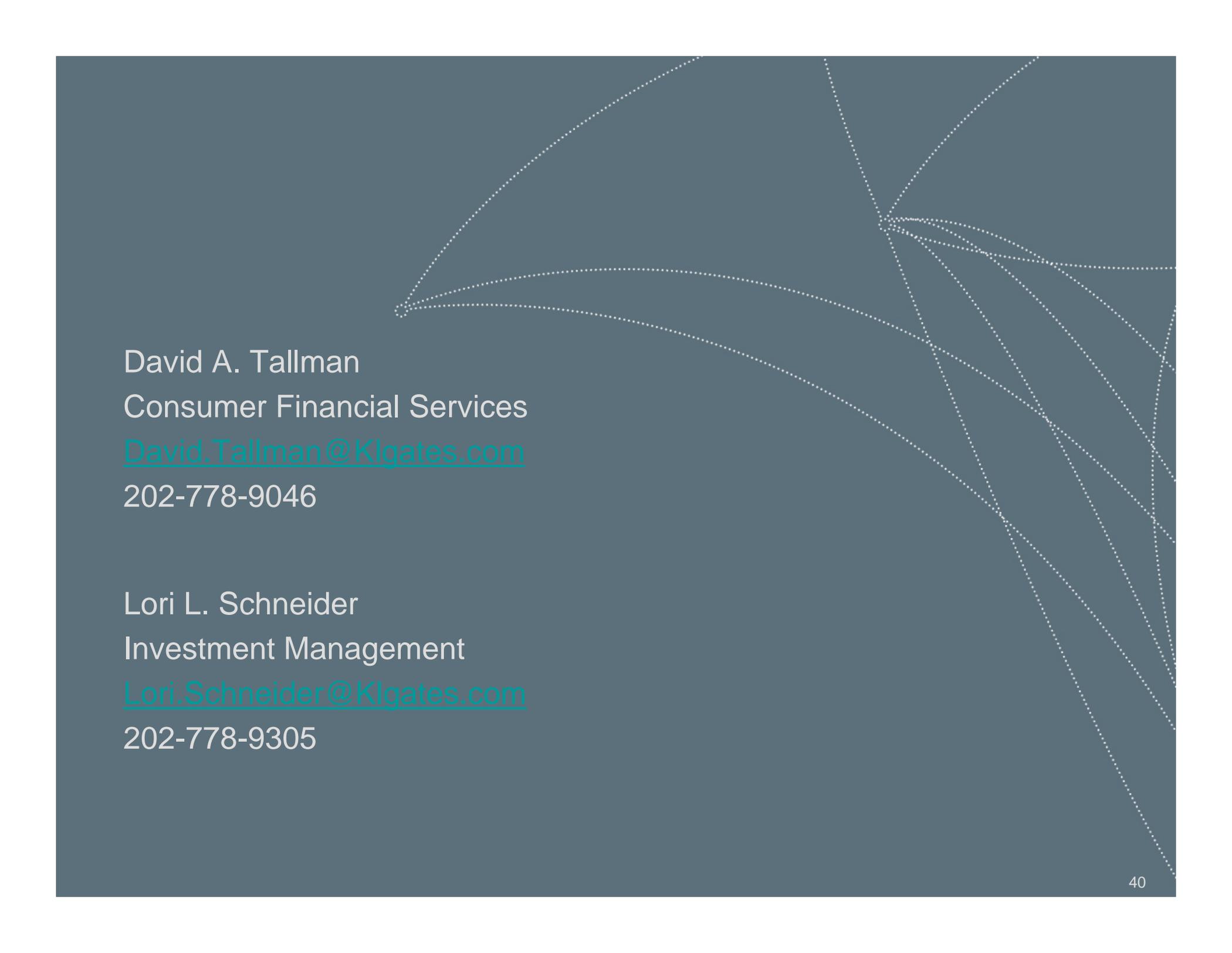
By: [Nanci L. Weissgold](#)

The Multistate Mortgage Committee's ("MMC") [new SAFE Act Examination Guidelines](#) ("SEGs" or "Guidelines") leave little doubt that nondepository institutions should expect more detailed and intrusive examinations of their mortgage loan originator ("MLO") hires and policies by state regulators. The MMC, a 10 state representative body formed under the CSBS/AARMR Nationwide Cooperative Protocol and Agreement for Mortgage Supervision, is responsible for developing a process for multistate mortgage examinations. Although created under the guise of multistate examinations, the intent of the MMC is to provide state regulators with a uniform examination process to determine SAFE Act compliance and to provide those same tools to in-house compliance and audit departments.

Continue Reading

TAGS: [CSBS examination guidelines](#), [MLO](#), [mortgage originator](#)

Global Foreclosure Settlement: The Success of Herding Cats



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