CARLTON FIELDS

Will Your Social Media Policies and Procedures Withstand Regulatory Scrutiny?

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June 24, 2013 -- This summer insurance and securities regulators are, independently, evaluating social media policies and procedures of regulated entities – insurance licensees and broker-dealers, respectively. The National Association of Insurance Commissioners ("NAIC"), through its Market Conduct Examinations Standards (D) Working Group ("Market Conduct Standards WG"), has issued proposed changes to the *Market Regulation Handbook* to incorporate examination procedures regarding social media. In addition, FINRA, through its Advertising Regulation Department, has issued a targeted examination ("sweep") letter requesting information on firms' social media procedures.

As can be expected, the Market Conduct Standards WG and FINRA have focused on the use of, and regulated entities' policies and procedures on, social media in ***marketing and sales.*** In addition, both have also posited that social media policies and procedures and written supervisory procedures also address ***complaints.*** Neither, however, has provided guidance as to when an unfavorable posting on a regulated entity's social media site constitutes a complaint. This leaves open the question as to what social media complaint policies and procedures should be adopted by regulated entities.

NAIC Social Media Market Conduct Standards

On April 22, 2013, the Market Conduct Standards WG exposed its revisions to the *Market Regulation Handbook* to incorporate market conduct procedures based upon the NAIC's 2012 white paper on *The Use of Social Media in Insurance*. These examination procedures reflect that an insurer's sales and marketing policies and procedures ***must specifically address social media activity***. The proposed social media marketing and sales procedures direct the examiner to:

- perform a search of social media sites with the regulated entity's name;
- identify social media sites in which the regulated entity is active;
- review identified social media sites and verify that any product information ***provided by the regulated entity*** is accurate;
- review the regulated ***entity's policies and procedures*** to identify the ***personnel involved in monitoring*** the regulated entity's marketing and sales-related social media activity;
- review the regulated entity's ***policies and procedures for tracking*** marketing and sales-related social media requiring regulated entity review; and
- if the regulated entity requires preapproval of producer advertising on the Internet, review the regulated ***entity's preapproval procedures*** to determine whether the regulated entity identifies marketing and

sales-related social media as also requiring regulated entity preapproval.

Complaint Handling

The Market Conduct Standards WG also included revisions to the complaint handling procedures. Specifically, the draft states:

If a regulated entity is using social media, the ***examiner should review the regulated entity's policies and procedures with regard to [the] regulated entity['s] handling of complaints*** received via social media. (sic)

In its May 24th comment letter, the American Insurance Association ("AIA") took issue with NAIC's proposed procedure for complaint handling. It noted that social media is often anonymous, and a means by which individuals may "express their gripes and receive instantaneous justification from a group of peers that the person is being treated unfairly despite the fact the gripe as reported may not be accurate or complete." In connection with the AIA's comments, the Market Conduct Standards WG conducted an informal survey of state regulators. It reported at its June 20th conference call that there was no consensus among state regulators whether unfavorable postings on social media should be viewed as a "formal complaint" which would be subject to state insurance complaint handling requirements. The chair appeared to recognize the difficulties establishing criteria as to when an unfavorable posting is a complaint. The chair requested comments from regulators and interested parties as to whether changes should be made to this procedure, including whether the procedure should be eliminated.

The comment period ends on July 12, 2013.

FINRA Social Media Sweep

On June 18, 2013, FINRA issued a sweep letter addressing social media spot-check procedures that firms are required to have for written communications – including electronic communications – under FINRA Rule 2210(c)(6). Among other things, FINRA asked firms receiving the sweep letter to provide:

- an explanation of how the firm is currently using social media at the corporate level in the conduct of its business;
- specific information about social media sites used by the firm at the corporate level;
- an explanation of how the firm's registered representatives and associated persons generally use social media in the conduct of the firm's business;
- the firm's written supervisory procedures ("WSPs") concerning the production, approval and distribution of social media communications;
- an explanation of the measures that the firm has adopted to monitor compliance with the firm's social media policies; and
- a tabular list of the firm's top 20 producing registered representatives (based on commissioned sales) who used social media for business purposes to interact with retail investors.

Customer Complaints

FINRA's social media sweep does not specifically request WSPs relating to complaints communicated through social media. In the past, however, FINRA has addressed the treatment of customer complaints communicated through text messages and tweets. In Regulatory Notice 11-32, FINRA provided additional guidance on reporting requirements under FINRA Rule 4530. In Q&A7, FINRA stated that FINRA Rule 4530 (d), which requires a firm to report quarterly statistical and summary information regarding written customer complaints that have been received, would include received text messages and tweets from firm customers expressing complaints about the firm or its associated persons. As an example of a tweet that must be reported, Q&A7 noted, "if a firm customer sends a tweet to the firm alleging that an associated person sold him unsuitable securities, the firm must report it pursuant to FINRA Rule 4530(d)." This suggests that FINRA firms must have a means of monitoring posts and tweets for complaints. The Q&A does not provide, and there has been no subsequent guidance on, what types of posts and tweets would constitute a complaint that would be subject to reporting in accordance with the requirements of FINRA Rule 4530.

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