'Like' It Or Not: Broker-Dealers And Social Media Access

Law360, New York (June 28, 2012, 1:32 PM ET) -- Broker-dealers and their associated persons are subject to a regulatory framework surrounding the use of social media that requires firms to supervise certain social media and electronic communications of the firm and its associated persons.

Federal and state legislators have been focused on regulating employers’ access to their employees’ or applicants’ social media pages and passwords. Legislators have adopted and proposed legislation limiting employers’ access to employees’ and applicants’ social media accounts. These actions may create conflicts between broker-dealers’ regulatory obligations and such legislation.

The spotlight on this social media issue began in early 2012 with a high-profile incident that captured national attention when a former Maryland corrections officer complained that his employer required him to provide access to his Facebook account while being re-certified for his job following a leave of absence due to his mother’s death.[1]

Because of this incident, and the resulting national attention and dialogue, federal and state legislators began efforts to regulate access to employees’ social media information.

Not surprisingly, given its highly publicized incident, Maryland recently became the first state to pass social media privacy legislation[2], and Illinois soon followed suit, becoming the second state with that type of legislation.[3]

Under the Maryland law, which is discussed in more detail below, employers in that state are precluded from requesting or requiring information such as the user name or password to access an employee’s or applicant’s personal social media sites, such as Facebook and Twitter.[4]

Other states, including California, Delaware, Massachusetts, Minnesota and New York, may soon follow Maryland’s and Illinois’s lead by passing their own social media legislation.[5]

Like their state counterparts, federal legislators are also interested in protecting the personal use of social media, resulting in the introduction of the Password Protection Act of 2012 (PPA).[6] The PPA would make it illegal for an employer to compel or coerce access to any online information stored anywhere on the Internet if that information is secured against general public access by the user.
Regulating access to social media may be viewed positively by civil rights advocates who believe the legislation protects employee rights, as well as by the business community, which believes the legislation may mitigate exposure to employment liability for claims such as discrimination, retaliation and privacy infringement.

The reality, however, is that limiting an employer’s access to employees’ social media information may adversely affect certain regulated companies, such as broker-dealers.

Based on a recent survey of independent broker-dealers, almost 80 percent of firms allow the use of social media.[7] As described in detail below, broker-dealers and their associated persons are subject to a regulatory framework surrounding the use of social media, requiring the supervision of certain social media and electronic communications. Thus, legislation that limits access to social media information may pose significant challenges for a large number of broker-dealers.

Below, we examine Maryland’s new social media privacy legislation as a template for what other jurisdictions may enact as social media privacy laws. We then discuss the regulatory requirements imposed on broker-dealers, as well as industry practices. We conclude by discussing the potential impact of the new social media legislation on broker-dealers.

**New Social Media Privacy Laws**

Maryland’s social media privacy legislation, which applies to prospective as well as existing employees, includes the following key provisions:

- Precludes employers from requesting passwords or other means to access a personal social media account or service available through an electronic communications device, such as Facebook, Twitter or LinkedIn;
- Precludes employers from taking retaliatory action, e.g., termination or other discipline, against an employee based on an employee’s refusal to provide this information; and
- Provides injunctions and/or monetary penalties for employer violations of the act.[8]

The Maryland legislation provides two exceptions from the general prohibition against accessing employee social media information.

First, when in possession of information indicating a potential wrongdoing, an employer is permitted to conduct an investigation for the “purpose of ensuring compliance with applicable securities or financial law or regulatory requirements.”[9]

Second, an employer may conduct an investigation if it has information about unauthorized downloading of the employer’s proprietary information or financial data.[10]

In other words, under Maryland’s statute, employers may investigate potential violations, but only when they possess information suggesting that a potential violation exists. These exceptions, however, are ambiguous in terms of when an employer may conduct such an investigation and what information may be requested as part of such an investigation.
Apart from these exceptions, employers are limited in their ability to access employees’ social media information.

Of the other states that have introduced social media legislation, Delaware, Illinois and Massachusetts include limited exceptions, but those exceptions do not expressly reference securities or broker-dealer regulatory requirements. Thus, the stage is set for broker-dealers to face conflicting mandates from such legislation and securities regulatory requirements.

**Broker-Dealer Regulatory Requirements**

The Financial Industry Regulatory Authority (FINRA) requires broker-dealers to supervise communications related to their business and comply with certain record-keeping requirements.

FINRA has clarified that these supervision requirements also pertain to associated persons’ use of social media websites, such as blogs and social networking sites used for business purposes, e.g., recommending securities, posting broker-dealer related information.

FINRA has described its concern as ensuring that “investors are protected from false or misleading claims and representations, and firms are able to effectively and appropriately supervise their associated persons’ participation in these sites.”

To assist broker-dealers in complying with these requirements, FINRA has published various regulatory notices on the use of the Internet and social media. This guidance makes clear that FINRA expects firms to adopt policies and procedures reasonably designed to effectively supervise associated persons who participate in social media sites for business purposes and to provide necessary training to comply with these procedures.

FINRA also has reminded firms that associated persons should engage in social media communications only if such communications can be effectively captured and supervised through firm supervisory systems.

Specific supervisory requirements depend on content and type of communication, such as static, e.g., profiles or banners, or interactive, e.g., real-time posts, communications. Given the possible voluminous nature of these communications, FINRA has stated that firms can implement risk-based supervisory procedures to review certain interactive communications.

Broker-dealers are also subject to FINRA and U.S. Securities and Exchange Commission (SEC) record-retention requirements for business-related communications, including those on social media sites. Specifically, firms must retain this information in a prescribed format and for specified timeframes.

**Broker-Dealer Practices**

To comply with these securities-law requirements, many firms have adopted a variety of policies and processes to capture and review applicable communications, including restricting the sites that associated persons may access for business purposes to those that allow firms to capture and review required information.

With the growing use of social media, some firms are faced with increasing pressure from business units to approve the use of additional sites and communications. Accordingly, certain firms may have adopted ad hoc procedures to review communications processed through sites that may not have requisite technology in place. To perform such a review, firms may require access to associated persons’ communications on these systems.
In addition to supervising associated persons’ communications, FINRA also expects firms to train and educate concerning their social media policies, as well as follow up on “red flags” that may indicate noncompliance, such as associated persons communicating about business through unapproved sites or not seeking required approval for certain types of communications.[22]

Many firms have addressed these needs by requiring disclosures of personal social media usage and certifications of compliance with applicable policies, such as affirming that an associated person has not communicated about business through personal social media sites.

In addition, some firms conduct spot-checks or audits to test for noncompliance. Firms may conduct such testing by accessing such sites directly using associated persons’ login information or by becoming “friends” of the associated person.

Potential Impact of the New Laws on Broker-Dealers

Social media privacy laws may pose potential complications for broker-dealers attempting to comply with regulatory requirements, most significantly, by limiting access to associated persons’ communications.

As explained above, access to associated persons’ business communications is critical to a broker-dealer’s compliance and supervisory programs. In certain circumstances, firms may believe they should review personal social media accounts to determine whether they have been used for business purposes.

Potential limitations to accessing this information under new social media privacy laws may hinder a firm’s ability to effectively comply with applicable securities laws and rules, as well as a firm’s own procedures. As firms assess the impact of these new statutes, firms may need to consider the following issues:

Application of Carve-Out Provisions to Firm Supervisory Obligations

While Maryland’s statute provides specific carve-out provisions, they are very limited and may not apply to most of the securities law regulatory requirements outlined above. While the law does permit an investigation for ensuring compliance with applicable securities requirements, the company needs to be in possession of information indicating a potential wrongdoing.

The law does not indicate what sort of information the company needs in its possession to meet the requirement or how the company can then investigate. If other states provide for similar carve-outs, these same issues may arise.

Employees vs. Independent Contractors

To date, the social media legislation would apply to employees and prospective employees only. As a result, it appears that these limitations would not apply to associated persons of a broker-dealer who are independent contractors. Firms that allow registered representatives to be either employees or independent contractors may be precluded from applying the same supervision of social media accounts to all representatives.

In addition, if independent contractors are also employees of an affiliate, the legislative prohibitions may still affect the broker-dealer’s ability to access such information. Under this scenario, the tension between FINRA’s requirement for broker-dealers to supervise social media activity and the legislative prohibition against the same may be alleviated.
Finally, independent contractors may argue that they should receive the same protections as employees even though they may not technically be covered by the legislation.

Use of Personal Accounts for Business Purposes

As discussed above, regulatory requirements apply to business-related communications processed through personal and through firm-sanctioned systems. In contrast, the statutes and proposed legislation concern only personal accounts, but that term is not defined. Thus, firms may need to assess their supervisory systems and procedures to address access to personal accounts while complying with the legislation.

Conclusion

These recent legislative developments demonstrate that, in addition to being tech-savvy and keeping up with SEC and FINRA pronouncements, broker-dealers must also keep apprised of more general legislation that could affect their regulatory obligations.

Based on our review of the laws, it appears that the legislators were unaware of the impact these statutes would have on financial services firms. It is now incumbent upon broker-dealers — possibly with FINRA’s assistance — to navigate through the potential land mines created by the legislation.

Will the legislators and regulators "like" how broker-dealers respond to the new legislation? Only time will tell.

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[9] Id.

[10] Id.


[12] NASD Rule 2210(b); FINRA Rule 4511; NASD Rule 3010(d).


[18] Id.

[19] Id.


[21] Id.


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