

SEC's Division of Investment Management Provides Guidance On Filing Requirements for Social Media and Other Interactive Content

The staff of the Securities and Exchange Commission's (the "SEC") Division of Investment Management recently published guidance to clarify the obligations of certain investment companies to file for review communications posted on social media sites and in other interactive communications where such communications are not required to be filed with the Financial Industry Regulatory Authority ("FINRA"). A copy of the staff's guidance is available at: <http://www.sec.gov/divisions/investment/guidance/im-guidance-update-filing-requirements-for-certain-electronic-communications.pdf>.

Background

Section 24(b) of the Investment Company Act of 1940 (the "1940 Act") makes it unlawful to, in connection with the offering of certain categories of investment companies, transmit any advertisement, pamphlet, circular, form letter or other sales literature addressed to or intended for distribution to prospective investors unless the material has been filed with the SEC. Rule 497 under the Securities Act of 1933 (the "1933 Act") requires investment company performance advertisements subject to Rule 482 under the 1933 Act to be filed with the SEC. Rule 24b-3 under the 1940 Act and Rule 497 under the 1933 Act provide that materials filed with securities associations such as the FINRA are deemed to be filed with the SEC.

FINRA Rule 2210 requires investment companies to file certain communications for review. In FINRA's 2012 revisions to Rule 2210, "retail communications that are posted on an online interactive forum" were excluded from FINRA's filing requirements. However, FINRA did not include such communications in its list of communications deemed to be filed with FINRA under FINRA Rule 2210(c)(8). In the past, FINRA has provided guidance that real-time, interactive content on social networking constitutes a public appearance, exempt from FINRA's 2210 filing requirements. However, FINRA also clarified in a release that despite FINRA's position, the SEC could still conclude that filing pursuant Rule 482 under the 1933 Act

and Section 24(b) of the 1940 Act is required. As a result, the staff of the SEC's Division of Investment Management has received a number of inquiries regarding whether certain interactive content posted in a real-time electronic form (i.e. chat rooms or other social media site) needs to be filed pursuant to Section 24(b) of the 1940 Act or Rule 497 under the 1933 Act.

The staff of the SEC's Division of Investment Management recently published examples to help clarify which categories of investment company interactive communications generally would need to be filed.

Division of Investment Management Guidance

The guidance provides examples of the kinds of interactive communications that the staff believes would and would not trigger a requirement to file with the SEC or FINRA. FINRA permits materials to be voluntarily filed which, pursuant to Rule 24b-3 under the 1940 Act, would then be deemed to be filed with the SEC. The staff's guidance notes that whether a communication needs to be filed ultimately requires a facts and circumstances analysis and that the staff's guidance may be superseded by future laws or changes in regulation.

The staff would generally view the following categories to be examples of interactive communications that would not need to be filed:

- Incidental mention of a specific investment company or family of funds not related to a discussion of the merits;
- Incidental use of the word “performance” without specific mention of some or all of the elements of a fund’s return;
- A factual introductory statement forwarding or including a hyperlink to a fund prospectus or other information filed pursuant to 1940 Act Section 24(b) or 1933 Act Rule 497;
- An introductory statement not related to a discussion of the investment merits of a fund that forwards or includes a hyperlink to general financial and investment information;
- A response to an inquiry by a social media user that provides discrete factual information not related to a discussion of the investment merits of the fund; and
- A response to an inquiry by a social media user directing the user to the fund prospectus or to access information filed with FINRA.

The staff would generally view the following categories to be examples of interactive communications that should be filed:

- Discussion of fund performance that provide specific mention of some or all of the elements of a fund’s return or promotes a fund’s returns; and
- A communication initiated by a fund issuer discussing the investment merits of a fund.

The staff’s guidance provides specific examples under each of the above categories that provide further clarification of what the staff views as needing to be filed.

Conclusion

Generally, the staff seems to be of the view that investment company issuers are required to file social media and other interactive communications that include statements about the investment merits of an investment company or specific references to mentions of an investment company’s performance. Where interactive communications include only factual statements that make no mention of an investment company’s merits or performance, or where communications direct social media users to an investment company prospectus or other materials that have been filed for review with the SEC or FINRA, the staff generally seems to be of the view that these materials do not need to be filed. Where filing is required, the filing requirement pursuant to Section 24(b) of the 1940 Act or Rule 497 under the 1933 Act may be met by filing such materials voluntarily with FINRA. Investment company issuers should consider this guidance as a part of evaluating their broader social media compliance programs.

If you would like to discuss any of the issues discussed in this Client Alert, please contact any attorney in our Investment Management Group or visit us online at chapman.com.

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