



PRIVACY & SECURITY LAW



REPORT

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Regulated Social Media: Practical Advice for Addressing Evolving Technologies in Regulated Industries



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Social media sites are rapidly redefining the flow of information from corporate entities. Few would doubt that sites such as Facebook or LinkedIn are nearing ubiquity, and their acceptance among those

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over-40 is growing daily. Burson-Marsteller's Global 100 Social Media Check-up study recently revealed that 65 percent of Fortune Global 100 companies have active Twitter accounts, 54 percent have Facebook fan pages, 50 percent have YouTube video channels and 33 percent have corporate blogs. Moreover, many companies are featured on pages outside of their control because some sites allow users to construct so-called "fan" pages in which unauthorized corporate individuals can create and administer pages that appear to be the official page for a corporate entity.

The legal issues created by this rise of social media are, like many other Internet law issues, somewhat unique and somewhat merely the application of pre-existing norms. Nowhere is the application of such pre-existing norms more prominent than in the heavily regulated sectors of our economy such as pharmaceuti-

icals, health care, financial services, telecommunications, and professional services.

Regulated industries have certainly not been left behind by these new technologies. One commentator tracked the utilization of social networks by U.S. hospitals and found that 77 percent had Twitter accounts, 60 percent had Facebook pages, 46 percent had YouTube channels and 13 percent had blogs.¹

Regulated industries, however, must grapple with unique regulatory requirements, as regulators themselves struggle to understand these evolving technologies and issue new guidance or adapt existing rules to fit them. The often unappealing choice between the awkward application of existing regulations and the looming possibility of new regulations specific to social media creates tensions for regulated companies seeking to participate meaningfully in online conversations while remaining within regulatory paradigms designed without reference to modern interactive media.

This article provides practical guidance on social media policies for regulated companies by first reviewing the existing legal framework at issue and then suggesting specific points recommended for social media policies. These recommendations include a number of best practices for social media use by those in regulated industries and suggested approaches to developing a social media policy that limits risk while allowing companies to participate in the ways that social media is changing the way regulated industries do business.

I. Communications Decency Act Presumptions

Significantly, the fundamental federal statutory norms regarding the freedom of Internet communication embodied in the Communications Decency Act apply with full force to social media—except where the Act is expressly limited or conflicts with other federal statutes. For regulated industries, this exception can easily threaten to swallow the rule of freedom from liability for the comments of others.

Section 230 of the Communications Decency Act of 1996 provides express protection to both online service providers and users from all actions against them based on the content of third parties, stating in relevant part that “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1). Moreover, administrators of sites are given express privileges to maintain sites in appropriate ways without fear of liability for moderating by a further provision that “No provider or user of an interactive computer service shall be held liable on account of any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.”

Together, these prohibitions significantly inhibit any common law actions against companies based on content posted by third parties that should not be attributed to them.² These protections, however, are not without

limitation.³ Section 230(e) of the Act, moreover, expressly limits the Act’s application in the context of federal criminal laws, intellectual property law, and communications privacy laws. Likewise, consistent state laws are not limited, although “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” Similarly, the relationship of the Act and other federal statutes remains to be sorted. Indeed, these norms, albeit central to the Internet and social media generally, will often fail to provide sound comfort to companies that are the subject of intense regulatory scrutiny regarding the overall message conveyed by their online presence.

II. Social Media in a Regulated Context

Regulatory consensus has yet to emerge on social media. Only now are government regulators in various industries attempting draft codes, often without reference to similar attempts in other fields. This section gathers these disparate attempts at regulation to explain and compare them.

The most robust regulation to date arises from the existing employment law restrictions on use and monitoring of computers by employers. The Financial Industry Regulatory Authority (“FINRA”) has led financial regulators in this area by providing guidance on social media for securities firms, including recordkeeping and supervision responsibilities. The Food and Drug Administration (“FDA”), for its part, is only beginning full consideration of how its current or new regulations may apply to social media. Most aggressively, the Federal Trade Commission (“FTC”) has issued guidance on the use of testimonials, which clarifies the legal restrictions on one of the most widespread and potentially “unfair or deceptive” uses of social media. Last, although not a regulator, the Office of Management and Budget (“OMB”) recently provided guidance for use of social media and interactive web-based technologies within the federal government itself.⁴

A. Employment restrictions

Employment law has long recognized a nearly pervasive ability for employers to monitor their employees,

Craigslist, Inc., 519 F.3d 666 (7th Cir. 2008) (finding no liability for creating online marketplace).

³ See, e.g., *Fair Housing Council v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (finding no immunity for content resulting from asking users questions regarding roommate preferences (gender, sexual orientation)).

⁴ Other laws may well apply. For instance, the CAN-SPAM Act of 2003 may apply to postings on social media sites. While CAN-SPAM was designed to regulate unsolicited commercial e-mails, it may be extended to cover other forms of electronic communications. Indeed, one federal court has already applied CAN-SPAM to in-network messages sent over MySpace. *MySpace, Inc. v. Wallace*, 498 F. Supp. 2d 1293 (C.D. Cal. 2007). If courts begin to apply CAN-SPAM to various forms of electronic communications beyond e-mail, companies that post commercial messages on social networking sites or that offer followers an incentive to send tweets or post messages on social network sites may be responsible for complying with CAN-SPAM requirements. These requirements include providing the recipients of the messages proper “from,” “subject,” and address information as well as an opportunity to opt out. A failure to comply can result in heavy fines. Meeting the CAN-SPAM requirements may be particularly challenging in the context of Twitter, given the space limitations in tweets.

¹ Ed Bennett, Hospital Social Network List, available at <http://ebennett.org/hsnl-full> (as of Feb. 13, 2010).

² See, e.g., *Doe v. MySpace*, 528 F.3d 413 (5th Cir. 2008) (holding negligence claims barred despite “artful pleading”); *Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v.*

and there are surely many permissible reasons for employers and prospective employers to monitor social networking sites. Social media certainly makes it possible for employers to gather additional information on job candidates to supplement their application profiles or corroborate information provided by applicants and/or current employees. Moreover, social networking sites give employers the power to investigate employees when there is reason to believe that an employee has engaged in conduct that is relevant to the company or the employee's employment relationship with the company.

In some instances, companies have a *duty* to investigate. The company may have a duty to investigate these sites where it knows of facts or has reliable objective evidence that would lead a reasonably prudent person to investigate a prospective or current employee. Such instances might include past history or recent threats of violence, complaints of harassment, sexual or otherwise, or knowledge of other conduct—such as involvement in racist or hate groups—that could create liability for the company.

Such use of social media, however, is not without legal risks. Employment law points to two primary areas of potential liability for any employer to avoid when using social media: violations of off-duty conduct statutes and violations of non-discrimination laws.

Off-Duty Conduct Statutes. So-called “off-duty conduct statutes” are generally divided into consumption statutes and lifestyle discrimination statutes.

Consumption statutes involve the lawful, off-duty consumption of alcohol and/or tobacco. Around 30 states have enacted statutes protecting employees from adverse employment actions based on their lawful consumption of legal products (such as tobacco or alcohol) while off-duty.⁵ Even where it is legal to discipline employees for their lawful consumption of alcohol and/or tobacco in your state, it is best to proceed carefully when disciplining employees who consume alcohol or tobacco while off-duty, particularly if the company would be unwilling to take such an action against another similarly situated employee in the future.

Far broader and more rare than consumption statutes, lifestyle discrimination statutes protect employees from discrimination for their lawful off-duty conduct, political activities, and/or beliefs. Four states have “lifestyle discrimination” statutes that restrict the ways employers can discipline and even terminate employees for non-criminal conduct outside the workplace.

- (a) **California** — The broadest statute in the nation, it prohibits discrimination against applicants and employees for any off-duty conduct; there is no exception for business interests/conflicts.
- (b) **New York** — The statute protects applicants and employees for their engagement in political and union activities and “legal recreational activi-

ties”; it provides exceptions where the conduct conflicts with a legitimate business interest.

- (c) **Colorado** — The statute is limited to termination of employees; it does not cover applicants. It provides exceptions for bona fide occupational requirements, job responsibilities, and to avoid conflicts of interest with any responsibilities to the employer.
- (d) **North Dakota** — The statute prohibits discrimination against applicants and employees. It provides exceptions where the conduct conflicts with a legitimate business interest.⁶

Almost all states—except California—recognize a legitimate business need as an exception to the prohibition against adverse employment actions. In other words, if an employee's off-duty conduct could harm the company, then it can likely discipline or terminate the employee.

Two states, Massachusetts and Connecticut, have weaker laws that afford employees more limited protections. Massachusetts protects employees from unreasonable interference with highly personal private matters; an exception exists for searches when an employer can articulate legitimate business reasons for seeking the information at issue.⁷ Connecticut prohibits discipline or discharge of employees for the exercise of their First Amendment rights (concerning matters of public concern); an exception exists if an activity interferes with employee's bona fide job performance or the working relationship between the employee and employer.⁸

Only a few cases have been tried under these statutes, and courts have generally afforded employers broad discretion to discipline/discharge employees where such off-duty behavior was shown to have damaged a company or its business interests.

Particularly in the context of employer monitoring of social media sites, it is also important to consider expectations of privacy and the Stored Communications Act. In *Pietrylo v. Hillstone Restaurant Group* (2009), plaintiff created a group on MySpace called “The Spectator,” where employees—by invitation only—could “vent about any BS we deal with at work without any outside eyes spying in on us. This group is entirely private, and can only be joined by invitation.” The site contained ethnic slurs and derogatory comments about guests and managers as well as discussions about drug use and sexual acts. A non-manager employee joined and showed content to a manager, who used a non-manager employee's account name and password to access the account and show it to other managers. Plaintiff and another co-worker were fired. A jury found that the company's managers had violated the Stored Com-

⁵ See, e.g., 820 ILCS 55/5. Section 5 reads “Discrimination for use of lawful products prohibited. (a) Except as otherwise specifically provided by law and except as provided in subsections (b) and (c) of this Section, it shall be unlawful for an employer to refuse to hire or to discharge any individual, or otherwise disadvantage any individual, with respect to compensation, terms, conditions or privileges of employment because the individual uses lawful products off the premises of the employer during nonworking hours.”

⁶ See Cal. Lab. Code § 96(k) (protecting, with limited exceptions, “lawful conduct occurring during nonworking hours away from the employer's premises”); Colo. Rev. Stat. Ann. § 24-34-402.5(1) (protecting, with job and conflicts limits, “any lawful activity off the premises of the employer during nonworking hours”); N.Y. Lab. Law § 201-d(2)(c) (protecting, with a conflicts limit, “legal recreational activities outside work hours, off of the employer's premises and without use of the employer's . . . property”); N.D. Cent. Code § 14-02.4-01 (protecting, with a conflicts limit, “lawful activity off the employer's premises during nonworking hours”)

⁷ M.G.L. Ch. 214, § 1B; *Bouley v. City of New Bedford*, 2005 US Dist LEXIS 30922 (D. Mass. 2005).

⁸ Conn. Gen. Stat. § 31-51q.

munications Act and the New Jersey Wire Tapping & Electronic Surveillance Act by intentionally accessing the MySpace page without authorization.⁹ The jury found in favor of the defendants on Pietrylo's claims for invasion of privacy, finding that the plaintiffs had no reasonable expectation of privacy in the MySpace group.¹⁰

Non-Discrimination Laws. Monitoring social media sites also creates risk around non-discrimination laws, which generally require that employers not take any adverse actions against applicants or employees based on knowledge of their race, color, religion, sex, national origin, disability, age, and, in certain jurisdictions, other protected characteristics such as sexual orientation.

In addition, an entity may not legally take any adverse actions against an applicant or employee based on newfound knowledge that the employees have engaged in concerted or protected activities, including where employees exercised their Section 7 rights under the National Labor Relations Act ("NLRA"). The NLRA protects employees who engage in concerted activities for their mutual aid and protection, including where they engage in discussions concerning their wages, benefits, or other terms or conditions of their employment.

Individuals may also be protected to the extent they are complaining of unlawful harassment or discrimination at work.¹¹

B. Social Media and Securities Firms: FINRA Guidance

The financial services industry has received the most detailed guidance to date from a regulator. In September 2009, FINRA organized a Social Networking Task Force comprising FINRA staff and industry representatives to discuss how securities firms and their registered representatives could use social media sites for business purposes, such as communication with clients and investors, while at the same time protecting investors. Based on input from the Task Force and others, FINRA issued *Notice 10-06* to guide firms on applying the communications rules to social media, including blogs and social networking sites. The stated goals of the *Notice* are to protect investors from false or misleading representations, while allowing firms the ability to supervise the representatives effectively as they participate in social media. *Notice 10-06* identifies a number of responsibilities:

1. Record Keeping Responsibilities

Most directly, FINRA requires that the firm keep records of its own communications and those of its authorized representatives. Perhaps obvious at first glance given requirements of Rules 17a-3 and 17a-4 under the Securities Exchange Act of 1934 and NASD Rule 3110, these provisions can prove challenging for social media because they are frequently designed to be

transient and to create content in a distributed fashion in which the communication is constantly changing its context. Indeed, with certain media, the overall communication itself can be the result of social interaction, and it can be based on a distributed means of content production that is not under the control of any particular entity, except for the site itself and then only after the fact of its creation. Nonetheless, the Securities and Exchange Commission and FINRA rules depend heavily on the content of the communication and require that broker-dealers must retain those electronic communications that relate to its "business as such."¹² These provisions apply both to interactive electronic communications that the firm makes as well as those made by its personnel using a social media site.

2. Supervision of Social Media Sites

Regulated entities are also affirmatively required to monitor and supervise use of social media sites. The rules do not require prior approval by a principal before posting, but there is a duty to supervise social media use under NASD Rule 3010 so that the entity can ensure that it does not post or sponsor impermissible content.¹³ In this regard, FINRA has relied upon its prior supervisory procedures guidance for electronic correspondence in *Regulatory Notice 07-59* (FINRA Guidance Regarding Review and Supervision of Electronic Communications). This prior guidance adapts well to social media in that it requires the use of risk-based principles to determine the extent of review of electronic communications necessary to ensure proper supervision. Accordingly, it expressly contemplated review after posting, including by sampling and searching. Helpfully, technology providers have developed systems that are intended to address both books and records rules and supervisory procedures for social media sites that are similar to those currently in use for e-mails and other electronic communications.

3. Employees' Use of Social Media

Significantly, FINRA's new social media guidance appreciates that the training and supervision of employees is a central element of any social media governance effort. The identification of which employees may, and which employees should not, comment on their firms in public social media is surely a central initial task. Under FINRA *Notice 10-06*, firms must adopt policies and procedures that are reasonably designed to ensure that their "associated persons" who use social media for business purposes are "appropriately supervised, have the necessary training and background to engage in such activities, and do not present undue risks to investors." In part, this is accomplished by appropriate training on the firm's policies and procedures. All other use of social media for business communications outside of the firm's supervision is prohibited. In particular, anyone who has previously presented significant compliance risks, especially with regard to sales practices, is a likely candidate to be barred for using social media for business purposes.

⁹ 2009 U.S. Dist. LEXIS 88702 (2009); see also Andrew M. Baer, "Pietrylo case a cautionary Web 2.0 communications compliance failure," SearchCompliance, June 27, 2009.

¹⁰ "Employee Privacy and Social Networks: The Case for a New Don't Ask Don't Tell," Citizen Media Law Project, July 2, 2009.

¹¹ Unlawful harassment is a form of discrimination that violates Title VII of the Civil Rights Act of 1964. Both state and federal law protect from retaliation employees who resist or object to discrimination or harassment.

¹² See SEC Rel. No. 34-37182 (May 9, 1996), 61 Fed. Reg. 24644 (May 15, 1996); SEC Rel. No. 34-38245 (Feb. 5, 1997), 62 Fed. Reg. 6469 (Feb. 12, 1997); *Notice to Members 03-33* (July 2003).

¹³ See "Ask the Analyst – Electronic Communications," NASD Regulation, *Regulatory & Compliance Alert* (Mar. 1999) ("March 1999 Ask the Analyst").

4. Third Party Posts

Interactivity is part of the power of social media, and an area of great difficulty for regulators. Under the FINRA guidance, customers and other postings by third parties are not subject to the principal approval, content and filing requirements. Nonetheless, some third-party posts may become attributable to the firm when it helps to create or explicitly or implicitly endorses or approves the content, notwithstanding the presumptions of the Communications Decency Act (discussed above). The SEC has referred to these approaches as an “entanglement” theory (*i.e.*, the firm or its personnel is entangled with the preparation of the third-party post) and an “adoption” theory (*i.e.*, the firm or its personnel has adopted its content).¹⁴ In the past, the SEC has used these theories as a basis for corporate responsibility for third-party information that is hyperlinked to a firm website. These analyses could well also apply to third-party posts on a social media site established by a firm or its personnel. Under such an entanglement theory, a third-party post could be considered a firm communication with the public if the firm or its personnel paid for or was involved with the preparation of the content prior to posting. Under the adoption theory, if, after the content is posted, the firm or its personnel explicitly or implicitly endorses or approves the post, FINRA could well consider the post to be the firm’s communication with the public.¹⁵

C. FDA

Equally complex are the challenges faced with regard to medical and health information. According to a recent survey by the Pew Research Center, 61 percent of American adults (83 percent of Internet users) now look online for health information.¹⁶ Pew also found that online health research has “an impact on decisions or actions and there are clearly more positive experiences than negative ones.” Forty-two percent of all adults, or 60 percent of e-patients, say they or someone they know has been helped by following medical advice or health information found on the Internet.¹⁷ In addition, one-third of Americans are now looking online for information about medicines.¹⁸

Despite a series of warning letters, signaling active monitoring and enforcement of Internet and social media, the FDA has yet to provide meaningful guidance on its regulatory oversight in this area. In November 2009, the FDA held a two-day forum to discuss industry comments and concerns regarding social media and the interplay with existing product promotion law; the FDA also provided interested parties with an opportunity to comment on new FDA guidance. This forum has contributed to widespread speculation that the agency will

issue guidance on the issue, but the nature and timing of future guidance remain unclear, leaving pharmaceutical companies to develop their own safeguards and strategies to ensure compliance with existing laws. More than 70 presentations were made at the forum, with a majority of the presentations by pharmaceutical, biotech, and Internet/media companies. Issues discussed included (1) what social media content should FDA-regulated entities be responsible for; (2) how should they meet their regulatory requirements for risk disclosure; (3) what content should they be required to correct online; (4) what constitutes adverse event information and what companies must do with such information; and (5) what form new guidance on social media should take. The FDA did not comment on any of the presentations or give a timeline for any forthcoming guidance.

To date, the FDA’s position appears to be that Internet communications are subject to the same statutory and regulatory provisions as traditional advertising and promotional labeling formats.¹⁹ Specifically, the FDA requires all media promotions referencing a product, which are conducted by or on behalf of the manufacturer, to include comprehensive information about the product’s risks; all direct and implied claims (*e.g.*, created through graphics, music, color, and themes) cannot be false or misleading; and the general net impression created by the promotion must be truthful, fair, and balanced. 21 C.F.R. §§ 202 *et seq.*

The requirement that all promotions include comprehensive information about the product’s risks has unclear implications for text limited forums, such as Twitter or sponsored links. The FDA appears to be limiting its guidance, for the moment, to that which can be extrapolated from warning letters addressing promotion through social media and the internet. In April 2009, the FDA issued 14 letters to major drug manufacturers citing sponsored links in violation of the Federal Food, Drug, and Cosmetic Act (“FDCA”).²⁰ The letters mandated that companies’ search advertisements—the short text ads that run beside search engine results pages—had to be rewritten to include risk information about each drug or else be removed. In May 2009, the FDA sent a warning letter to Johnson & Johnson regarding allegedly false and misleading statements in a direct-to-consumer (DTC) Web cast video.²¹ The FDA letter alleged that the Web cast was false or misleading because it omitted and minimized the risks of the drug Ultram ER and also impermissibly overstated its efficacy, asserting that it has benefits that have not been demonstrated.

Industry advocates have argued that disclosure requirements must reflect inherent space limitations. They contend that it is an established FDCA principle that promotional communications occurring in space-limited media are governed by reduced risk disclosure requirements, subject to the central requirement that

¹⁴ See *Commission Guidance on the Use of Company Web Sites*, SEC Rel. No. 34-58288 (Aug. 1, 2008), 73 Fed. Reg. 45862, 45870 (Aug. 7, 2008) (“2008 SEC Release”); *Use of Electronic Media*, SEC Rel. No. 33-7856 (April 28, 2000), 65 Fed. Reg. 25843, 25848-25849 (May 4, 2000).

¹⁵ See 2008 SEC Release, *supra* note 7, 65 Fed. Reg. 45870 n.78.

¹⁶ Susannah Fox & Sydney Jones, Pew Internet and American Life Project, *The Social Life of Health Information—Americans’ Pursuit of Health Takes Place Within a Widening Network of Both Online and Offline Sources 4* (June 2009) (“Pew Survey”).

¹⁷ *Id.* at 7.

¹⁸ Manhattan Research, *Cybercitizen Health Study* (2009).

¹⁹ See “Eye on the FDA”, March 17, 2009, Interview with Dr. Jean Ah Kang, Special Assistant to Division of Drug Marketing, Advertising and Communications Director, Tom Abrams.

²⁰ FDA Warning Letter, Shire Development Inc., April 14, 2009.

²¹ FDA Warning Letter, Johnson & Johnson, May 12, 2009.

they be truthful and non-misleading.²² Advocates in the November forum noted that promotion designed merely to draw attention to the name of the product generally need not provide comprehensive risk information. See 21 C.F.R. §§ 202.1(e)(2)(i), 201.100(f). In the context of social media promotion of medical products, some urged the FDA to establish new requirements that reflect users' "click-through" behavior and other ways in which their approach to obtaining risk and other qualifying information may differ from the conventional media setting. See Nov. 12 Internet Public Hearing Tr. at 438-40.

It is unclear how the FDA's response to social media will evolve. One possible solution might involve FDA approving prominent use of the FDA's own logo or a new universal FDA-approved graphic symbol, along with a standard universal warning that would be approved by FDA (e.g., "All drugs have risks. Click here for more information from the manufacturer") in places throughout the Web where there is not enough room for complete disclosure of all warnings, indications, and contraindications (e.g., search results and microblog posts.) The prominent graphic and link could take users directly to pages displaying the FDA-approved Prescribing Information (PI) and/or Medication Guides. The use of the FDA's own logo, or some other FDA-approved symbol, would increase the prominence of the link and also help patients and healthcare professionals identify the official manufacturer sites containing FDA-regulated benefit and risk information.

For now, the FDA's warning letters indicate that the agency is not necessarily willing to let the space limitations of online media reduce the amount and immediacy of information pharmaceutical companies are obligated to provide. To ensure continued compliance with existing regulations (and possible compliance with forthcoming regulations), companies will need to consider (1) the development of internal systems, such as a system for moderating misleading or off-label information; (2) systems for responding to complaints about social media content; (3) procedures for ensuring appropriate disclaimers and disclosures; and (4) a system for collecting adverse event information. Companies also need to stay apprised as to third-party generated content regarding their products. While such companies may or may not be legally responsible for third-party content, establishing protocols to handle these situations likely will assist in compliance with applicable laws, product liability defense, and brand protection.

²² FDA's justification for impinging on First Amendment values is highest when the agency focuses on prohibiting promotional communications that are false or misleading. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980), and restrictions appropriately tailored to prevent false or misleading promotional communications generally will not run afoul of First Amendment protection of commercial speech. The constitutional boundaries of FDA's authority to regulate manufacturer communications remain a subject of active judicial consideration. See, e.g., *Commonwealth Brands, Inc. v. United States*, No. 1:09-cv-117-M (W.D. Ky. Jan. 4, 2010) (citing freedom of speech, the court struck down: (1) a ban on use of color and graphics in advertising/labeling; and (2) a ban on statements implying that tobacco products are less dangerous by virtue of government regulation.).

D. FTC Testimonial Guidance

The FTC may well be the ultimate regulator of this space, and various parties have called on it to develop comprehensive guidance in this area. Section 5 of the Federal Trade Commission Act gives the FTC authority to enforce against unfair and deceptive acts and practices. An act or practice is deceptive under Section 5: (1) if there is a representation or omission of information that is likely to mislead the consumer acting reasonably under the circumstances; and (2) if that representation or omission is "material"—defined as an act or practice "likely to affect the consumer's conduct or decision with regard to a product or service."²³ An act or practice is unfair under Section 5 if it causes or is likely to cause substantial injury to consumers that is not reasonably avoidable by consumers and that does not have countervailing benefits to consumers or competition.²⁴

At present, however, the FTC's new guidance concerns only testimonials, but it does clarify certain legal contours of social media use. The FTC's revised Guides Concerning the Use of Endorsements and Testimonials in Advertising ("Guides") became effective on December 1, 2009, and apply where any speaker acts on behalf of an advertiser or its agent. If the advertiser has sponsored the speaker's endorsement, an obligation to disclose "material connections" arises. Whether the speaker-advertiser relationship involves a "sponsorship" that must be disclosed depends on various factors, including: whether the speaker is compensated by the advertiser, the terms of any agreement between the speaker and its advertiser, the length of the relationship between the speaker and the advertiser, etc.²⁵ An endorsement is broadly defined as "any advertising message . . . that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser."²⁶ The FTC Guides provide the example of a tennis star who has a contract paying her to speak publicly about her laser surgery; if she touts the results of laser surgery, mentioning the clinic by name on a social networking site, her relationship with the clinic must be disclosed, as this would affect credibility consumers would give the endorsement.²⁷

The FTC Guides make clear that advertisers have liability for false or unsubstantiated statements made through endorsements, as well as liability for failure to fully disclose the material connection between them and the endorser that might materially affect the weight or credibility of the endorsement (e.g., advertiser providing endorser with free products, employee of advertiser, etc.). Endorsers have liability for statements made in the course of their endorsements (e.g., bloggers), where not adequately disclosed. The FTC has indicated a clear intention to enforce the Guides; most recently it investigated—but ultimately declined to recommend enforcement action against—a clothing store for its pro-

²³ FTC Deception Policy Statement, appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 175 (1984).

²⁴ 15 U.S.C. § 45(n).

²⁵ Federal Trade Commission, 16 C.F.R. part 255, "Guides Concerning The Use of Enforcements and Testimonials in Advertising," at 9.

²⁶ 16 C.F.R. § 255.0(b).

²⁷ 16 C.F.R. § 255.5.

motion program that allegedly offered bloggers gift cards in exchange for covering an event.²⁸

E. OMB Guidance

The final contributor to these early attempts at regulation is the Office of Management and Budget, in its function as the regulator of federal operations. In a recent Memorandum, OMB expressly addressed the application of the Paperwork Reduction Act of 1995 ("PRA") to Federal Agency use of social media and web-based interactive technologies.²⁹ The memorandum concludes that under established principles, the PRA does not apply to many uses of social media. In essence, the memorandum uses a scale of formality to determine whether the PRA applies to a certain use of social media. For example, offering the public opportunities to comment on discussion topics through social media websites, blogs, microblogs, or message boards would not trigger applicability of the PRA. See OMB Memorandum, "Social Media, Web-Based Interactive Technologies, and the Paperwork Reduction Act," April 7, 2010, at 3-4. By contrast, web surveys posing identical, specific questions, via web poll or pop-up windows, would be subject to the PRA. *Id.*

More significantly, the memorandum reflects the engagement of the White House with these significant issues as well as pointing toward an approach under which regulatory bodies specifically will likely continue an incremental evolution of new norms for web-based technologies based on their potentially widely divergent attributes.

III. Practical Suggestions For Social Media Policies

Despite the relatively nascent state of regulation over social media, its use is growing rapidly. An *Information-Week* research survey recently found that social networks use by nearly half of companies included viral marketing, recruiting, peer networking, emergency coordination, and communications. And social media tools are not available only from the mass-market Web sites like Facebook, MySpace and Twitter. Contact Networks, IBM, Leverage Software, Microsoft, and SelectMinds all sell products that let businesses create internal social networks.

As with law, business has not fully appreciated the changes and cautions required by the rapid ascension of social media. In a recent cross-industry survey of 472 executives by the Economist Intelligence Unit of the professional services firm KPMG, only 28 percent of all respondents included Web 2.0 in their risk management process. The Economist Intelligence Unit concluded that businesses need to assess the benefit of having a company group on sites like Facebook or LinkedIn. They also need to make sure that the company creates a policy on social media use and employs software or other methods to monitor where the company name appears on the Internet.

Until there is more clarity in this area, companies are well advised to create conservative social media policies that allow them to reap at least some of the benefits of

social media while avoiding the most salient risks. In this regard, most companies are developing several different types of social media policies that underscore the importance of the company's reputation and branding.

Separate policies often address the company's own efforts to exploit the benefits of social media, the use of social media by its employees, and the company's approach to protecting its own trademarks and intellectual property against social media cyber-squatters. The last of these topics is an interesting article in its own right, and we do not have the space to address it well here. But there are some key themes that should be frequently included in policies that both control the company and its employee's use of social media.

In particular, these policies frequently include such clauses:

- **Transparency in Identity:** Specifically delineate who may speak for the company online and make clear that others may not represent or appear to represent the company. The corollary of this corporate principle is to require unauthorized speakers to state that the views expressed are the employee's own. In particular, it is important to prohibit work-related online testimonials or referrals by employees unless there is full disclosure.
- **Integration.** Social media outreach efforts are best conceived as part of the overall marketing initiatives of a company. Likewise, social media policies should reference other relevant company policies such as those addressing the need to protect business confidential and personal information.
- **Proportionality.** Social media can easily be overdone by both companies and individuals. In particular, it is important to restrict the use of company equipment for social media posting or make clear that the employer will assert a right to inspect such usage and that the employee should have not an expectation of privacy.
- **Contextualization.** Initial approaches to social media often relied upon a one-size-fits-all approach which flatters no one. Policies should be tailoring based on existing practices and industry specific laws and concerns including:
 - Any required content, such as disclosure statements
 - Consumer expectations
 - State laws
 - Applicable privacy law, such as Health Insurance Portability and Accountability Act restrictions on posts about medical patients
- **Respecting Boundaries.** Social media can draw companies into any numbers of discussions that once would have been avoided. Many of them still should be. It is vital for companies to bar discussing legal matters, revenue, pricing, new product plans, financial results, share price and other problematic topics, such as its competitors. And of course disparagement or other derogatory comments should be avoided, even if the CEO wants to attack the competition in his blog.
- **Control.** Although the Communications Decency Act should provide companies with some level of protection against liability for posts of third-parties, its application to regulated industries can be limited. Most companies assert and exercise a right to remove any unlawful or inappropriate

²⁸ FTC Letter, Ann Taylor Stores Corporation, April 20, 2010.

²⁹ Cass Sunstein, Office of Management and Budget, "Social Media, Web-Based Interactive Technologies, and the Paperwork Reduction Act," April 7, 2010.

postings and/or ownership of any content created on company-controlled social media sites. Likewise, policies often provide notice that, to the extent allowed by law, employees will be disciplined for violating the company's Social Media Policy.

- **Non-Discrimination.** The potential for micro-targeting through social media opens up interesting marketing possibilities. But companies must restrict any potential of micro-targeting to niche social media sites based on legally impermissible criteria, e.g. redlining. Likewise, with respect to personnel, it is important to restrict the use of the Internet in hiring so that any research of candidates is performed according to a written protocol that articulates specific triggers and procedures for the consistent use of appropriate levels of background checks in evaluating applicants.

- **Process.** Corporate use of social media still has an uncontrolled and exploratory element to it, and it is essential for companies to maintain open communication that integrates insights from all levels within the organization and all ages of colleagues.

In formulating these policies, companies are well-advised to begin with a thoughtful consideration of their goals for the use of social media in light of the regulatory environment in which they operate and the consumers, clients, and business partners with whom

they desire to communicate. Existing company policies and procedures can often inform these considerations, but usually new internal controls and procedures are indicated. At the very least, coordinated discussion with human resources, marketing, IT, and compliance functions is essential to ensure that the use of social media does not progress within the organization without appropriate oversight and coordination. Even in the most disciplined organizations, missteps in this evolving area are to be expected, and it is certainly prudent to develop plans to respond appropriately to social media missteps, including the conduct of internal investigations when necessary.

For present purposes, the most important compliance issue is to ensure that there is considered engagement with the issues. It will be many years before either law or business has "grokked"³⁰ this revolution in the creation, combination and distribution of information, and perhaps the law is fated to trail such rapidly-evolving technologies, but the thoughtful consideration of the best practices from both other companies and analogous areas will help to improve the eventual control of social media in regulated industries.

³⁰ Robert A. Heinlein, *Stranger in a Strange Land* (1961).