

Comment on FINRA's Guidance for Social Networking Sites

In Notice to Members 10-06, <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p120779.pdf>, FINRA outlines the requirements for the capture of Social Media Web Sites or social networking sites. This Review discusses the challenges from the perspective of an institution having to comply with FINRA's guidance and explores which issues should be addressed with technology and which with policy.

During the 1990s, email systems became common in the financial industry, and most firms managed their own email servers. When the SEC determined that email records were customer communications and thus corporate records, the financial industry rushed to implement either in-house or external systems, that could capture the email content (typically using a journaling mailbox which captured all email going in and out of the email system). Even though capture was not anticipated at the time these email systems were implemented, centralized servers and the journalizing option made implementing email archives relatively simple and straight-forward.

Like email, social networking systems proliferated before there was regulatory guidance. However, unlike email with its internally-managed centralized servers, social networking sites are externally hosted and not readily conducive to capturing content and archiving. Moreover, most of these sites explicitly state in their User Agreements that capture and monitoring of the content is a violation of the user contract.

Financial firms are, now left between the monster Scylla of FINRA guidance and regulation and the Charybdis of employees desire to leverage these platforms. Unlike in the Odyssey, there does not seem to be a line that allows firms to avoid each monster.

FINRA 10-06 states:

FINRA does not endorse any particular technology necessary to keep such records, nor is it certain that adequate technology currently exists.

While FINRA has confidence that technology will emerge that will address the technical requirements to capture and monitor social networking content, what FINRA fails to realize is that it is not in the interest of many of these social networking sites to provide links and access to content. To summarize our opinion on the two major social networking sites:

LinkedIn:

We have had discussions with LinkedIn's legal department and though they are aware of the SEC requirements, they are currently bound to the current user agreements that protect their user's privacy. Nevertheless, they now allow corporate access to recruiting email and allow for the download of public profile information. These public profiles exclude the intellectual property which LinkedIn incorporates for users actually logged into their site.

Two basic technologies have emerged to capture LinkedIn content:

- **Packet sniffing** – This technology is deployed at the firewall of the network and any content which goes to or from the LinkedIn site is captured.

- The advantage of this technology is that it can capture all content from LinkedIn provided access is within the institution's firewalls.
- The disadvantage is that it violates the LinkedIn agreement and when access occurs from home or the road, content cannot be captured.
- **Public Profile and InMail Capture** – This technology goes to the public profile of each employee and pulls the content from LinkedIn. These programs access the site on a scheduled basis and compare the employee's profile with the previous version. Only if there is a change does the program submit it into archival storage.
 - The advantage is that it does not violate LinkedIn agreements and does not incorporate into the archive any LinkedIn proprietary intellectual property. An additional advantage is that these technologies will capture content regardless whether updates occur at home or on the road.
 - The disadvantage is that some content is not collected.
- **Additional comment** – LinkedIn wants to become an employment recruitment site and build revenues by creating corporate relationships. As such, it is friendly towards working with corporations and addressing their content archiving and supervisory requirements.
 - As a recruiting tool, users tend to put more positive resume data on LinkedIn and less social content than they would on Facebook. This makes LinkedIn much more business-oriented and more conducive to contacting customers. The downside is that employee's profiles on LinkedIn tend to make claims which may require compliance to monitor.
 - For employees of financial institutions, content on LinkedIn is often considered advertising and requires pre-approval of content.

Facebook:

Whereas LinkedIn generally wants to work with corporations, Facebook does not. Facebook's business model is not based on corporate recruitment but rather on advertising. Facebook only wants 'eye balls'. As such, they have resisted any relationship which captures content and may, as a result, deter users from posting content or accessing profiles.

As such, the public profile pages on Facebook contain much less content than the comparable pages on LinkedIn.

Summary

Each institution must select those social networking platforms on which it is appropriate for employees to conduct business. Policies should be developed on all other platforms, to restrict reference or business representations. As more social networking sites proliferate, it is important that the function of these sites, and employee use, is reviewed on at least an annual basis.

Though it is very difficult to comply with FINRA's guidance, we recommend that firms implement technologies for those sites which they believe are appropriate for their business. This arena is changing so quickly and we recommend against trying to discover a complete and overly-expensive solution. Yet, to do nothing, is to not comply with the guidance of NTM 10-06.