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To: Our Clients and Friends

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Recent SEC Decision Identifies Social Media and Outside Activity Risks for Investment Advisers And Broker-Dealers

An SEC Administrative Law Judge (ALJ) recently issued a decision that provides helpful guidance to investment advisers and broker-dealers in constructing their compliance programs and supervisory systems to account for risks relating to use of social media and outside activities. (Link 1) The SEC filed an enforcement action in early 2012 against Anthony Fields, alleging that he violated various SEC rules by offering fictitious "prime bank" instruments for sale on various social media websites and that he had made misrepresentations in his Form ADV and brochure. (Link 2) The SEC announced its enforcement action against Fields at the same time that it released its long-awaited Social Media guidance for investment advisers. (Link 3)

Fields was the sole owner of Anthony Fields & Associates, an investment adviser that he registered with the SEC in 2010. Fields also owned another entity, Platinum Securities Broker, that registered with the SEC as a broker-dealer in March 2010, only to withdraw its registration in September 2010 because it lacked adequate net capital.

Fields advertised the availability of several types of prime bank schemes through a number of postings on LinkedIn and several other social media sites. These prime bank schemes, which promised outsized returns, were fraudulent. Fields testified, and the SEC ALJ found, that Fields intended to be a "broker" for prime bank transactions—that is, he intended to be an intermediary introducing buyers and sellers, and believed he would be paid a commission for his role.

The SEC alleged, among other things, that Fields and his entities violated the antifraud and books and records provisions of the Investment Advisers Act. These books and records provisions require that SEC-registered investment advisers maintain, for five years, certain specified communications, including those sent to 10 or more people. The SEC claimed that, because the LinkedIn postings were available to the public and because Fields did not retain copies of the communications, the firm failed to maintain adequate books and records. However, the ALJ dismissed the Investment Adviser Act books-and-records charges against Fields, finding that he intended to act as a broker rather than as an investment adviser with respect to the postings, and that therefore his conduct fell outside of the Act.

That conclusion, however, provided little solace for Fields. The ALJ used these same findings to conclude that Fields was operating as an unregistered broker-dealer, because these advertisements were posted on social media after the time that Fields' broker-dealer withdrew its registration. Further, the ALJ found that Fields committed fraud with the postings under the Securities Act because he was at least reckless in not realizing that the prime bank schemes he advertised, which promised significant returns for transactions that did not make economic sense, were fraudulent.

The ALJ also found that Fields committed fraud through statements made in the investment adviser's Form ADV. Fields represented that the firm had $400 million in assets under management, and that it had several high net worth clients. In fact, the investment adviser never had any assets under management and never had a single client.

For these violations, the ALJ barred Fields from the securities industry, fined him $150,000, and revoked his registration under the Investment Advisers Act.

In light of this decision, firms should consider the following:

- **For Investment Advisers:** Firms should recognize that statements they make (or their representatives make) to the public on social media, on a website, and otherwise, will be subject to the SEC's books-and-records rules. Documents relating to such statements need to be maintained for five years in an easily accessible place. Firms should not take too much comfort from the dismissal of the books-and-records charges against Fields—such an outcome was narrowly drawn and may be an aberration. Firms should also recognize that the Advisers Act contains its own fraud provisions, and any reckless or exaggerated statements could result in an enforcement action on those grounds. Consequently, firms should have a robust compliance program built around training associated personnel on the use of social media and also have systems in place to capture and retain communications made to the public. Firms should also recognize that statements made regarding an unregistered security could be deemed a general solicitation in violation of the Securities Act.
- **For Broker-Dealers:** Like investment advisers, firms should have robust compliance and supervisory systems in place with respect to communications to the public, including communications on social media. Broker-dealers should also realize that social media can be used as a vehicle for activities away from the firm, which could lead to private securities transactions, outside business activities, and suitability violations. The Fields ALJ specifically found that Fields' advertisements for the prime bank schemes, made via social media, were broker-dealer activities governed by the Exchange Act. For these reasons, it is critical that firms require representatives to take training that addresses communications via social media before using any such tool, and to require representatives to sign an annual acknowledgement (or equivalent) indicating they understand the firm's policies regarding communications with the public (including social media), and agree to abide by them.
- **For Dual Registrants:** Dual registrants should have a system in place to identify the particular capacity in which a representative is acting with respect to communications to the public. Training should also be required on this subject. Depending on the substance and context of a communication, along with the intent of the speaker, the Exchange Act, the Investment Advisers Act, or both could conceivably apply.

For questions or further information, please speak to your regular Bryan Cave contact, a member of our White Collar Defense and Investigations or Securities Litigation and Enforcement groups, or the authors of this client alert:

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