Social Media and the Rise of the Finfluencers
Monday, May 16, 2022
1:45 p.m. – 2:45 p.m.

Human behavior has evolved as a result of the pandemic. For the financial services industry, the rapid acceleration of digital adoption has dramatically changed the way we engage with each other and our clients. Join FINRA staff and industry panelists as they discuss how social media and social media influencers are affecting the industry. Panelists discuss new developments, effective compliance practices, and how their firms are managing social media obligations.

Moderator:
Stephanie Gregory
Associate Director
FINRA Advertising Regulation

Panelists:
Lisa Colone
Chief Counsel
FINRA Enforcement

Michael Gerena
Senior Director, National Cause Program
FINRA Member Supervision

Terrie Hanna
Vice President and Associate General Counsel
Fidelity Investments

Social Media and the Rise of the Finfluencers Panelists Bios:

Moderator:

Stephanie Gregory is Associate Director of the Complex Review Team in FINRA's Advertising Regulation Department. Ms. Gregory's primary responsibility is managing staff members dedicated to the review of matters involving complex products and novel regulatory concerns. Her team provides support to other FINRA departments in connection with firm examinations and enforcement proceedings that involve communications with the public. Ms. Gregory joined the Advertising Regulation Department in 2004. She received her bachelor's degree in Economics and Political Science from Boston University, and her law degree from Pennsylvania State University Dickinson School of Law.

Panelists:

Lisa Colone serves as Chief Counsel in FINRA's Enforcement Department. She joined FINRA in 2016 and served as Senior Regional Counsel until her promotion to Chief Counsel in May 2018. Prior to joining FINRA, Ms. Colone served as Deputy Chief of the Criminal Division at the U.S. Attorney's Office for the District of New Jersey. In that role, Ms. Colone supervised more than 35 Assistant U.S. Attorneys in the Office's Economic Crimes Unit, Asset Forfeiture and Money Laundering Unit, and General Crimes Unit. Prior to her promotion to the position of Deputy Chief, Ms. Colone served as the Chief of the General Crimes Unit at the U.S. Attorney's Office. Ms. Colone also served as the lead prosecutor on numerous criminal prosecutions. Ms. Colone graduated from the University of Virginia and the University of Virginia School of Law. Prior to joining the U.S. Attorney's Office, she was an associate at Cleary Gottlieb LLP. Ms. Colone also clerked for the Honorable Catherine C. Blake, U.S. District Judge for the District of Maryland.

Michael Gerena is Senior Director of FINRA's National Cause Program and is located in Long Island, New York. In this capacity, Mr. Gerena is currently responsible for leading the Cause Examination Program for all of the retail firm groupings. Within this role, he is responsible for overall operations of the department, including the development and implementation of strategic and tactical measures necessary to ensure timely, high-quality completion of the departments regulatory program. Mr. Gerena is also actively involved in several initiatives related to FINRA's National Cause Program and other FINRA-wide initiatives. Mr. Gerena's tenure at FINRA began in 2004 and prior to serving in his current position, he has served in a variety of staff and management roles, most recently serving as the Associate District Director managing the sales practice cause staff in the New York and Long Island offices. Prior to joining FINRA, Mr. Gerena worked as a Variable Annuity Suitability Analyst at a broker-dealer. Mr. Gerena graduated from the State University of New Yok at Oswego and completed the FINRA Certified Regulatory and Compliance Professional™ (CRCP™) program at Wharton.

Terrie J. Hanna is Vice President and Associate General Counsel in the Personal Investing and Wealth Management group of the legal department of Fidelity Investments. Since arriving at Fidelity in 2011, Ms. Hanna has supported the development of new retail brokerage and advisory products, with a focus on high net worth and financial planning. Currently, Ms. Hanna and her team provide primary legal support for the retail marketing and communications teams, including support of the firm's social media channels and digital engagement practices. Ms. Hanna began her career with the Boston-based firm of Foley Hoag LLP, practicing in the areas of corporate, securities and tax law, and later joined Dechert LLP to focus her practice on the financial services industry. She then served as counsel to the Brokerage Division of SunGard Data Systems, Inc. for eight years, providing regulatory and transactional support to the firm's regulated subsidiaries, before returning to Dechert where she represented broker-dealers and investment advisers. Ms. Hanna earned a J.D., *summa cum laude*, from Boston University School of Law in 1990, and

a M.B.A., *high honors*, from Boston University Graduate School of Management in 1991. She received a Bachelor of Arts, *cum laude*, from Colby College in 1985.

Social Media and the Rise of the Finfluencers

Panelists

- **Moderator**
  - Stephanie Gregory, Associate Director, FINRA Advertising Regulation
- **Panelists**
  - Lisa Colone, Chief Counsel, FINRA Enforcement
  - Michael Gerena, Senior Director, National Cause Program, FINRA Member Supervision
  - Terrie Hanna, Vice President and Associate General Counsel, Fidelity Investments

To Access Polling

- **Please get your devices out:**
  - Type the polling address, **https://finra.cnf.io/sessions/xeg8** into the browser or scan the QR code with your camera.

  - Select your polling answers.

Polling Question 1

1. Do you have a print subscription to the Wall Street Journal?
   a. Yes
   b. No

Polling address: **https://finra.cnf.io/sessions/xeg8**

Polling Question 2

2. Do you have a Facebook account?
   a. Yes
   b. No

Polling address: **https://finra.cnf.io/sessions/xeg8**

Polling Question 3

3. Do you have a TikTok account?
   a. Yes
   b. No

Polling address: **https://finra.cnf.io/sessions/xeg8**

Polling Question 4

4. Do you use Reddit?
   a. Yes
   b. No

Polling address: **https://finra.cnf.io/sessions/xeg8**

Frequently Asked Questions About Advertising Regulation

On This Page

^ Back to top

FINRA Rule 2210 Interpretive Guidance

BLOCK: Advertising Regulation - Interpretive Guidance FAQ

A. Definitions

A.1. Institutional Communications

A.1.1. Q. If a firm distributes an institutional communication to intermediaries that fall within the definition of "institutional investor" and labels the communication for use only with institutional investors, and an intermediary subsequently distributes the communication to retail investors, is the member then required to treat the communication as a retail communication?
A. Unless the firm becomes aware that the intermediary has distributed the communication to retail investors, or the firm has not adequately labeled the communication, the firm will not be required to treat the communication as retail. FINRA Rule 2210(a)(3) defines "institutional communication" as "any written (including electronic) communication that is distributed or made available only to institutional investors, but does not include a member's internal communications." FINRA Rule 2210(a)(4) (the definition of "institutional investor") states in part that "No member may treat a communication as having been distributed to an institutional investor if the member has reason to believe that the communication or any excerpt thereof will be forwarded or made available to any retail investor."

For example, a broker-dealer that receives an institutional communication from a mutual fund underwriter is responsible for assuring that its associated persons do not forward the communication to retail investors. The "reason to believe" standard is not intended to require a mutual fund underwriter to audit recipient broker-dealers' use of institutional communications.

Assuming a firm adequately labels an institutional communication as being for institutional use only, the firm would not have reason to believe, absent other facts, that the communication will be distributed to retail investors. However, if the recipient broker-dealer informs the fund underwriter that it intends to distribute the communication to its retail customers, or the fund underwriter otherwise becomes aware of this practice, the fund underwriter must either treat the communication as a retail communication going forward, or cease distributing institutional communications to the recipient broker-dealer until it reasonably concludes that the broker-dealer has adopted appropriate procedures to prevent redistribution.

Posted: 5/22/15

A.1.2. Q. FINRA Rule 2210(a)(3) defines "institutional communication" to exclude a firm's internal communications. Does "internal communication" include training and educational material prepared for use with registered representatives of affiliated broker-dealers?
A. No. "Internal communication" refers to communications within a firm. If a firm uses material to train or educate registered representatives of other broker-dealers (whether affiliated or unaffiliated), the material would be considered an institutional communication.

Posted: 1/7/13

B. Principal Approval

B.1. Third Party Research Reports

B.1.1. Q. If a firm distributes only to institutional investors a third-party research report that does not qualify as an independent third-party research report pursuant to FINRA Rule 2241(a)(3), is the firm required to have a registered principal or supervisory analyst approve the report prior to distribution?
A. No. A third-party research report that is distributed only to institutional investors as defined in FINRA Rule 2210(a)(4) is considered an institutional communication under FINRA Rule 2210(a)(3). FINRA Rule 2210(b)(3) permits a firm to distribute an institutional communication without having a registered principal approve the communication prior to distribution, provided that the firm establishes and implements certain written procedures for the supervision and review of such communications.

FINRA Rule 2241(h)(1) requires a registered principal or supervisory analyst to review for compliance with the applicable provisions of Rule 2241(h) and approve third-party research reports distributed by the firm unless the report meets the definition of "independent third-party research report."[1] However, this rule is not intended to require registered principal or supervisory analyst approval of a third-party research report that meets the definition of institutional communication. Accordingly, a firm may supervise such a report in the same manner as any other institutional communication pursuant to FINRA Rule 2210(b)(3).[2]

Updated: 12/14/15

B.2. Business Development Companies

B.2.1. Q. Does a Series 26 registration (Limited Principal - Investment Company and Variable Contracts Products) qualify a principal to approve a retail communication concerning a BDC?
A. No. A BDC is not registered as an investment company under the Investment Company Act of 1940. Accordingly, the Series 26 registration does not qualify a principal to approve a retail communication concerning a BDC. To approve a retail communication concerning a BDC, the registered principal must possess either a Series 24 (General Securities Principal), a Series 9/10 (General Securities Sales Supervisor) or a Series 39 (Limited Principal - Direct Participation Programs) registration, if the BDC is structured as a direct participation program as defined in NASD Rule 1022(e)(2).[3]

Posted: 5/22/15

B.3. Questions concerning principal approval of non-promotional communications (see Section C.4.) and for social media posts in online interactive electronic forums (see section C.6.).

C. Filing Requirements and Filing Exclusions

C.1. Filing Requirements

C.1.1. Q. Is a firm required to file with FINRA a retail communication concerning a business development company (BDC) that is registered under the Securities Act?
A. Yes. BDCs fall within the definition of direct participation program under FINRA Rule 2310(a)(4). Accordingly, firms must file with FINRA retail communications concerning BDCs that are registered under the Securities Act within 10 business days of first use or publication pursuant to FINRA Rule 2210(c)(3)(B).

Posted: 5/22/15

C.1.2. Q. FINRA Rule 2210(c)(3)(E) requires a firm to file within 10 business days of first use or publication retail communications concerning any security that is registered under the Securities Act of 1933 and that is derived from or based on a single security, a basket of securities, an index, a commodity, a debt issuance or a foreign currency (registered structured products). What types of products does this filing requirement cover?
A. While it is not possible to list all registered structured products, examples include exchange-traded notes that are not registered under the Investment Company Act but are registered under the Securities Act, registered reverse convertibles, registered structured notes, registered principal protection notes, and any other registered security that includes embedded derivative-like features. See Regulatory Notice 12-03 for some examples of registered structured products.

The purpose of this filing requirement is to have firms file with FINRA retail communications about structured products that are registered under the Securities Act. It is not intended to create a duplicative requirement for retail communications that are already subject to filing, such as retail communications concerning mutual funds, closed-end funds, exchange-traded funds that are registered under the Investment Company Act, variable insurance products, direct participation programs or collateralized mortgage obligations.

While this filing requirement applies to retail communications concerning registered structured products, it does not apply to issuer-prepared prospectuses, including issuer-prepared free-writing prospectuses that are filed with the SEC.[4]

Posted: 1/7/13

C.2. Filing Exclusion for Non-Material Changes to Previously Filed Retail Communications

C.2.1. Q. If a firm has previously filed a retail communication and then decides to use the same communication in a different format, must the firm refile the communication as it appears in the new format?
A. No. FINRA Rule 2210(c)(7)(A) excludes from filing retail communications that previously have been filed with FINRA and that are used without material change. FINRA would not consider revising a retail communication to appear in a different format to be a material change, provided that the content has not materially changed. For example, if a firm has previously filed a retail communication in the format that it appears on a desktop or laptop computer, and the firm is redesigning the presentation to appear on a tablet or smart phone, the firm would not have to refile the version that will appear on a tablet or smart phone.

Posted: 5/22/15

C.2.2. Q. What if a firm uses responsive Web design technology[5] to deliver a retail communication in different formats depending on the device used by a customer? Must the firm file each version of the retail communication to show how it will appear on each device?
A. No. For the same reasons set forth in the answer to the previous question, FINRA would not consider delivery of the same content in a retail communication in different formats using responsive design technology to be a material change to the communication. Accordingly, a firm would only have to file the retail communication once.

Posted: 5/22/15

C.2.3. Q. If a firm previously filed a retail communication that was initially distributed in print form, and the firm later decides to post the same communication on its website, must the firm refile the website version of the retail communication with FINRA?
A. No, provided that the content of the website version of the retail communication appears without material change from the previously filed print version.

Posted: 5/22/15

C.2.4. Q. If a firm changes the color scheme of a previously filed retail communication, must the firm refile the new version of the retail communication?

A. No. FINRA would not regard merely changing the color scheme of a previously filed retail communication to be a material change to the communication.

Posted: 5/22/15

C.2.5. Q. Is a firm required to re-file retail communications concerning a mutual fund that changes its name, if the only changes to the previously filed communications are substitutions of the fund's new name for its old name?
A. No. Assuming the fund has changed its name in any required filings with the SEC, FINRA would not consider merely changing the fund's name from previously filed retail communications concerning the fund to be a material change to the communications.

Posted: 5/22/15

C.2.6. Q. If a mutual fund passes its five-year or ten-year anniversary since inception, and a firm adds a new line to previously filed retail communications that present fund performance to show the fund's five-year or ten-year performance record as required by SEC Rule 482, must the firm re-file the revised retail communications?
A. No. FINRA would not consider merely adding a fund's five-year or ten-year performance record as required by Rule 482 to previously filed retail communications to be a material change.

Posted: 5/22/15

C.2.7 Q. The SEC presumes that the use of the terms "adviser" or "advisor" in a name or title by a broker-dealer that is not also registered as an investment adviser, or an associated person that is not also a supervised person of an investment adviser, to be a violation of the capacity disclosure requirement under Regulation Best Interest. If a firm previously filed a retail communication with FINRA, but now needs to revise the communication to eliminate references to adviser or advisor in the firm's name or an associated person's title because of Regulation Best Interest's presumption, would the firm be required to re-file the communication with FINRA?
A. No. Provided that the only revisions to the previously filed retail communication are eliminating references to adviser or advisor in order to comply with Regulation Best Interest, the firm would not be required to re-file the communication. Under these facts, FINRA would not consider such revisions to be a material change.

Posted: 5/20/20

C.3. Filing Exclusion for Templates

C.3.1. Q. A firm acts as a principal underwriter of a mutual fund family, and each fund in the family offers multiple classes of shares. If the firm creates a separate fact sheet for each share class of every fund in the family, is the firm required to file every fact sheet with FINRA if the only differences between the fact sheets for each share class of a particular fund are a share class's sales load, fees and performance?
A. No. FINRA Rule 2210(c)(7)(B)(i) excludes from filing retail communications that are based on templates that were previously filed with FINRA the changes to which are limited to updates of more recent statistical or other non-narrative information. If a firm files fact sheets for all share classes of one fund in its fund family, and the share class fact sheets for other funds follow the same format in presenting sales load, fee and performance information, then the firm would not be required to file the fact sheet for each share class of the other funds in the family. Instead, pursuant to the filing exclusion for templates, the firm would be permitted to file the fact sheet for only one share class of each of the other funds in the fund family. The firm should indicate as part of its filing that it is relying on the filing exclusion for templates in cases where the firm is filing only one share class fact sheet for a particular fund.[6]

Posted: 5/22/15

C.4. Non-Promotional Communications

C.4.1. Q. Is a firm required to file with FINRA, or have a principal approve prior to use, a retail communication that is limited to market commentary concerning overall changes in the market on a particular day, or a discussion of economic news?
A. No. General market commentaries or economic discussions that are not used for the purpose of promoting a product or service of the firm would be considered retail communications that do not make any financial or investment recommendation or otherwise promote a product or service of the member. See FINRA Rules 2210(b)(1)(D)(iii) and 2210(c)(7)(C).

Posted: 5/22/15

C.4.2. Q. Is a firm required to file, or have a principal approve prior to use, a retail communication that merely explains factual information regarding an individual retirement account, qualified plan or 401(k) account?
A. No. These kinds of retail communications also would be considered to be non-promotional and thus not subject to the principal pre-use approval or filing requirements. See FINRA Rules 2210(b)(1)(D)(iii) and 2210(c)(7)(C).

Posted: 5/22/15

C.4.3. Q. Is a firm required to file, or have a principal approve prior to use, a retail communication that merely provides information to participants in an employee retirement plan as required by the Employee Retirement Income Security Act of 1974 (ERISA) or the current Department of Labor (DOL) rules under ERISA? For example, would a firm be required to file a retail communication that merely informs participants in an employee retirement plan of changes to the investment options that are available through the plan?

A. In most cases, no. A firm would not be required to file or have a principal approve prior to use a notice distributed to plan participants that is required by ERISA or DOL rules, such as a notice that merely informs the participants of investment options that will no longer be available through the plan as of a particular date, and the investment options that will replace the eliminated options.

FINRA would consider such a notice to be a retail communication that does not make any financial or investment recommendation or otherwise promote a product or service of the member. However, if the notice also includes performance or other information that describes the investment objectives of the new investment options, or otherwise includes a headline or other graphic or text that promotes these new options, the firm would be required to file the notice, unless this information is required by ERISA or DOL rules.[7]

Posted: 5/22/15

C.4.4. Q. Is a firm required to file its stationery or the business cards of its associated persons?

A. No. These communications are not subject to filing requirements.

Posted: 5/22/15

C.4.5. Q. Is a firm required to have a principal approve prior to use or file with FINRA a video posted online that does not recommend or promote a product or service of the firm? New

A. No. In accordance with the exceptions in FINRA Rules 2210(b)(1)(D)(iii) and (c)(7)(C), a firm is not required to have a principal approve prior to use or file with FINRA a video posted online that does not recommend or promote a product or service of the firm, provided that the firm supervises and reviews such videos in the same manner as correspondence pursuant to FINRA Rules 3110(b) and 3110.06 through .09.[8] For example, FINRA Rule 3110(b)(4) requires that a firm's written supervisory procedures include procedures for the review of electronic communications related to the firm's investment banking or securities business and such procedures must be appropriate for each firm's business, size, structure, and customers.

Posted: 9/30/21

C.5. Article Reprints

C.5.1. Q. If a firm wishes to distribute to its customers a reprint of an article concerning a product subject to one of the filing requirements that appeared in an unaffiliated magazine or newspaper, and the only change that the firm made to the article was to add the firm's name and any disclosures necessary to meet applicable regulatory standards, is the firm required to file the article reprint with FINRA?

A. No. If a firm merely adds its name to the reprint or adds disclosures required to make the reprint consistent with applicable regulatory standards, the firm is not required to file the reprint with FINRA pursuant to FINRA Rule 2210(c)(7)(I).[9]

Posted: 5/22/15

C.6. Social Media Posts in Online Interactive Electronic Forums

C.6.1. Q. Did the adoption of FINRA Rule 2210 change the exceptions from the principal pre-use approval and filing requirements for posts in the interactive electronic forum portions of social media as compared to the requirements under NASD Rule 2210?

A. No, these exceptions have not changed. NASD Rule 2210 included as a communication category public appearances, which was defined to include participation in an interactive electronic forum. NASD Rule 2210 did not require principals to approve public appearances prior to use, and did not require firms to file public appearances with FINRA.

FINRA Rule 2210 treats interactive electronic forum posts, such as social media status updates, as retail communications rather than public appearances; however, the rule specifically excludes these posts from both the principal pre-use approval requirements and the filing requirements. See FINRA Rules 2210(b)(1)(D)(ii) and 2210(c)(7)(M). Accordingly, these exceptions have not changed with respect to posts on interactive electronic forums, despite the fact that they are no longer considered public appearances for purposes of the rule.[10]

Posted: 5/22/15

D. Content Standards

D.1. Disclosure of Expense Reimbursement Arrangements in Mutual Fund Performance Advertising

D.1.1. Q. If a firm presents mutual fund performance information in a retail communication, and the fund's expenses are subsidized through a fee waiver or expense reimbursement arrangement, must the firm disclose this arrangement?

A. FINRA Rule 2210(d)(5)(A) requires retail communications and correspondence that present non-money market fund open-end management investment company performance data as permitted by Securities Act Rule 482 and Investment Company Act Rule 34b-1 to disclose, among other things, the fund's total annual operating expense ratio, gross of any fee waivers or expense reimbursements, as stated in the fund's prospectus fee table.

FINRA also permits a firm to present in performance communications the fund's subsidized expense ratio, as long as the firm presents both the gross and subsidized expense ratios in a fair and balanced manner. If a firm wishes to present a fund's subsidized expense ratio in correspondence or retail communications, the communication must disclose whether the fee waivers or expense reimbursements were voluntary or mandated by contract, and the time period, if any, during which the fee waiver or expense reimbursement obligation remains in effect.[11]

Posted: 5/22/15

D.1.2. Q. May a retail communication or correspondence concerning a mutual fund also include an "adjusted expense ratio" that illustrates the impact of interest and dividend expenses incurred by the fund from borrowings, repurchase agreements or investments in short sales?

A. Yes. Because interest and dividend expenses incurred from borrowings, repurchase agreements or investments in short sales (whether directly or through investments in underlying funds) are considered fund expenses under generally accepted accounting principles, they must be included in a fund's gross and net expense ratios disclosed in the prospectus fee table. Provided that the communication includes the fund's gross and net expense ratios, it also may include an "adjusted expense ratio" that is the fund's gross expense ratio reduced by any amounts contractually waived or reimbursed, and further reduced by interest and dividend expenses resulting from borrowings, repurchase agreements or investments in short sales. The communication should clearly label, and include a prominent plain English explanation of, the adjusted expense ratio, which should be presented separately from, and with no greater prominence than, the fund's gross and net expense ratios.

Posted: 12/2/19

D.2. Recommendations

D.2.1. Q. Do the disclosure requirements regarding recommendations apply to a mutual fund portfolio manager's discussion of the fund's past performance (such as a manager's discussion that accompanies an annual or semi-annual report)?

A. No. While these discussions must comply with FINRA Rule 2210, FINRA does not consider a portfolio manager's discussion of a fund's past performance to be a firm's recommendation of the individual securities included in the discussion.

Posted: 1/7/13

D.3. Provision of Related Performance Information

D.3.1. Q. FINRA's letter to Edward P. Macdonald, Hartford Funds Distributors, LLC ("Hartford"), dated May 12, 2015 ("Hartford Letter") interpreted FINRA Rule 2210 to allow Hartford to include Related Performance Information in communications concerning mutual funds that are distributed solely to institutional investors, as that term is defined in FINRA Rule 2210(a)(4), subject to enumerated representations and conditions. Provided that the presentation is consistent with the representations and conditions contained in the Hartford Letter, may a firm show Related Performance Information that is net of the fees and expenses of the advertised mutual fund?

A. Yes. In condition 5 of the Hartford Letter, Hartford represented that the presentation of Related Performance[12] Information will disclose performance information that is net of fees and expenses of Related Accounts[13], or net of a model fee that is the highest fee charged to any account managed in the strategy. Condition 5 also stated that the fees and expenses of the registered fund that is the subject of the institutional communication will be prominently disclosed and this fund's performance will reflect all fees and expenses. Condition 5 also stated that if the registered fund's fees and expenses are higher than the Related Accounts' fees and expenses, that fact will be disclosed.

A presentation of Related Performance Information that is net of all fees and expenses of the registered mutual fund that is the subject of an institutional communication, rather than the fees and expenses of the Related Accounts, is consistent with the intent of the Hartford Letter. The institutional communication must prominently disclose the fact that the Related Performance Information is shown net of the registered fund's fees and expenses and, if applicable, that the registered fund's fees and expenses are lower than those of the Related Accounts.

Posted: 3/9/17

D.3.2. Q. Is the Hartford Letter intended to allow the presentation of Related Performance Information in an institutional communication concerning an actively managed exchange-traded fund ("ETF") that is registered under the Investment Company Act of 1940?

A. Yes. A firm may present Related Performance Information in an institutional communication concerning an actively managed ETF, provided that this presentation is consistent with the representations and conditions contained in the Hartford Letter.

Posted: 3/9/17

D.4. Usability Study and Focus Group Communications

D.4.1. Q. If a firm distributes a communication solely for the purposes of recruiting individuals who might be part of a group to provide feedback or participate in a usability study (through a focus group or otherwise), or solely for the purposes of communicating a "blind" or anonymous survey, must the firm disclose its member name under Rule 2210(d)(3) in the communication?

A. No. Rule 2210(d)(3) expressly states that it does not apply to "blind" advertisements used to recruit personnel. Similarly, it would not apply in these recruiting and feedback situations in which using a member name would counteract the purpose of the communication.

Posted: 1/16/19

D.4.2. Q. If a firm distributes a communication solely to one or more individuals who are engaged to provide feedback concerning the communication or participate in a usability study concerning the communication (through a focus group or otherwise), and those individuals are informed that the communication is being provided solely for such purpose, would that communication be subject to Rule 2210 and its requirements?

A. No.

Posted: 1/16/19

D.5. Use of Hyperlinks in Electronic Communications New

D.5.1. Q. Does FINRA Rule 2210(d)(1)(A) permit a firm to include in electronic communications hyperlinks to content that provides additional information related to the communication in a fair and balanced manner?

A: Yes. FINRA Rule 2210(d)(1)(A) requires firm communications, among other things, to be fair, balanced, and not to omit any material fact or qualification if the omission would cause the communication to be misleading. Consistent with these standards, a firm may rely on a hyperlink to provide additional information or explanations so long as the initial electronic communication that includes the link is itself fair and balanced. For example, a non-misleading electronic communication about opportunities in emerging markets could link to an additional explanation about the basis for a claim in the initial post as well as the risks associated with emerging markets investments. However, a firm may not rely on linked explanations or disclosures to correct a communication that is, on its face false, misleading, exaggerated or promissory. [14] To the extent practicable in the given medium, the link itself, or the text within the communication that introduces the link, should state what will be provided through the link.

Historically, FINRA has interpreted the Communications with the Public Rules to permit hyperlinks to explanations and further information in a variety of situations. For example, FINRA Rule 2210 permits firms to use hyperlinks within banner advertisements to generate interest in a topic and provide more information through hyperlinks, [15] and FINRA has interpreted FINRA Rule 2210 to permit firms to link to required information about testimonials.[16]

This approach is also consistent with the treatment of hyperlinks in the Commission's recently adopted Investment Adviser Marketing rule under the Investment Advisers Act of 1940. [17] The Marketing Rule Adopting Release notes that the rule's use of "fair and balanced" is closely aligned with FINRA Rule 2210's general standards, and that investment advisers may use layered disclosure that employ hyperlinks to meet these requirements. [18]

Posted: 9/30/21

D.6. Internal Rate of Return (IRR) New

D.6.1. Q. Regulatory Notice 20-21 (FINRA Provides Guidance on Retail Communications Concerning Private Placement Offerings) interprets FINRA Rule 2210 to permit the inclusion of an internal rate of return (IRR) if it is calculated in a manner consistent with the Global Investment Performance Standards (GIPS®) adopted by CFA Institute and includes additional GIPS-required metrics such as paid-in capital, committed capital and distributions paid to investors. What is the distinction between calculating IRR in a "manner consistent with the GIPS standards" and "GIPS compliance"?

A. The guidance in *Regulatory Notice 20-21* that IRR be calculated in a "manner consistent with the Global Investment Performance Standards (GIPS)" refers to using the same primary inputs and calculation methodology articulated in the GIPS standards as well as including prominently in the communication the additional required metrics set forth in the GIPS standards. The primary inputs are external cash flows and the period-end value of the investment or terminal value. With respect to the calculation methodology, since-inception IRR can be calculated using common spreadsheet software and the extended IRR (XIRR) function. [19]

Firms that comply with all of the applicable requirements of the GIPS standards on a firm-wide basis may claim compliance with the GIPS standards (i.e., they are "GIPS compliant"). Firms are not required to claim compliance with GIPS or choose to have their firm verified in order to use IRR in private placement communications in a manner that is consistent with the requirements of FINRA Rule 2210.

While the GIPS standards generally prohibit firms from making any statement referring to the calculation methodology as being "in accordance," "in compliance," or "consistent" with the GIPS standards, CFA Institute has created a limited exception for firms and their agents in retail

communications concerning private placement offerings that are prepared in a manner consistent with FINRA Rule 2210 and the guidance in *Regulatory Notice 20-21*. [20]

It is also important to recognize that the requirement to present IRR calculated in a "manner consistent with the Global Investment Performance Standards (GIPS)" only applies to investment programs with ongoing operations that include a combination of realized and unrealized holdings.

When presented in a fair and balanced manner, realized historical performance for a completed investment program, whether expressed as IRR or any other return metric, will generally be consistent with the content standards in FINRA Rule 2210. In contrast, as stated in *Regulatory Notice 20-21*, IRR presented for privately placed new investment programs that have no operations or that operate as a blind pool is a projection prohibited by FIRNA Rule 2210(d)(1)(F).

Posted: 9/30/21

D.6.2. Q. If an investment program has both realized and unrealized holdings, may a firm show returns for each of the realized holdings without also showing the program's IRR?
A. Presenting returns solely for realized holdings in a program with ongoing operations without presenting the fund's IRR may be consistent with FINRA Rule 2210 provided that the information presented is fair and balanced. If a communication shows returns for any realized holding, then returns for each realized holding must be shown with equal prominence. "Cherry picking" or excluding returns for realized holdings that performed poorly would be misleading and inconsistent with FINRA Rule 2210(d)(1)(B).

In contrast, unrealized holdings have no actual performance experience, and any return metric would require its valuation to be estimated. Such metrics would represent a prohibited projection under FINRA Rule 2210(d)(1)(F).

Posted: 9/30/21

D.6.3 Q. May a firm aggregate realized holdings of an investment program together into an "aggregate realized investment" return without showing the total program's IRR?
A. As a general matter, it is misleading for a communication to include metrics that combine or average the performance of only the individual realized holdings. Such metrics may mask unequal or poor returns and the results may not be representative of the ultimate performance of the unrealized holdings or the program as a whole. This is the case whether or not the total fund IRR is included.

Posted: 9/30/21

D.6.4 Q. A firm wants to prepare a communication for an ongoing program that includes an IRR and the additional metrics required by the GIPS standards in accordance with *Regulatory Notice 20-21*. Is the firm allowed to also include information beyond what is required by the GIPS standards?
A. Generally, a firm may include information beyond what is required by the GIPS standards in a communication for an ongoing program. Any information must be presented in a fair and balanced manner, must not be misleading, and otherwise must be consistent with the content standards of FINRA Rule 2210(d).

Posted: 9/30/21

D.7. Prohibition on Predictions or Projections of Investment Performance New

D.7.1 Q. May a firm include in a retail private placement communication a "target return" to investors if the communication also includes the assumptions and key risks underlying the return?
A. FINRA Rule 2210(d)(1)(F) prohibits predictions or projections of performance, the implication that past performance will recur, and any exaggerated or unwarranted claim, opinion or forecast. As discussed in Regulatory Notice 20-21, "retail communications may not project or predict ***returns to investors*** such as yields, income, dividends, capital appreciation, percentages or any other future investment performance." This prohibition extends to retail communications that include target returns to investors. However, Regulatory Notice 20-21 makes clear that Rule 2210(d)(1)(F) does not prohibit reasonable forecasts of ***issuer operating metrics*** (e.g., forecasted sales, revenues or customer acquisition numbers) that may convey important information regarding the issuer's plans and financial position, provided that the retail communication provides a sound basis for evaluating the facts as required by Rule 2210(d)(1)(A). Such reasonable forecasts may take the form of target issuer operating metrics, so long as the retail communication does not provide a target return to investors. The Notice also provided guidance on the types of information that should be included, and the factors firms should consider, when creating, reviewing, approving or using forecasts of issuer operating metrics in retail communications.

Posted: 12/8/21

E. Limitations on Use of FINRA's Name

(No Q&As currently under this section)

F. Public Appearances

F.1. Supervision Updated

F.1.1. Q. If a registered representative makes a scripted presentation at a seminar for prospective retail investors, what is the responsibility of the firm with which the representative is associated to supervise the presentation?

A. A sales script used in a seminar is considered a retail communication under FINRA Rule 2210 (assuming the script is used with more than 25 retail investors within a 30 calendar-day period).

The firm with which the representative is associated is responsible for approving prior to use any retail communication used as part of the seminar presentation. If a retail communication is subject to a filing requirement under FINRA Rule 2210, the firm also must file the communication with FINRA. FINRA Rule 2210(f)(3) requires each firm to establish written procedures that are appropriate to its business, size, structure, and customers to supervise its registered representative's public appearance. These procedures must provide for education and training, documentation of such education and training, and surveillance and follow-up to ensure that representatives implement and adhere to the procedures.

Posted: 1/7/13

F.1.2 Q. Our firm's registered representatives may meet with groups either in person or using online conferencing platforms. How should firms supervise these meetings?

A. Firms must supervise registered representatives' live meetings with customer groups, whether in person or through an online conferencing platform, in a manner reasonably designed to achieve compliance with applicable securities laws and regulations and FINRA rules, including FINRA Rule 2210(f). This rule provision sets forth supervision and content standards for public appearances such as seminars, forums, media interviews or other public speaking activities that are unscripted and do not constitute retail communications, institutional communications, or correspondence.

Posted: 9/30/21

F.1.3 Q. If a registered representative uses visual aids, such as a whiteboard or dynamic charts, or a chat or instant messaging feature during a live, unscripted online conference, how should a firm supervise these aspects of the presentation?

A. Depending on the nature and number of persons attending the meeting, the use of these visual aids may be correspondence, retail communications or institutional communications, and the firm must supervise them as such. See FINRA Rules 2210(a), 2210(b) and 3110(b)(4). In addition, their content must be consistent with applicable standards, such as those in FINRA Rule 2210(d).

For example, if a representative meets with fewer than 25 retail investors, and uses the chat feature of the online conferencing platform to answer a live question, that chat content meets the definition of correspondence in FINRA Rule 2210(a)(2). The firm must review the chat content in the same manner as required for supervising and reviewing any other correspondence pursuant to FINRA Rule 3110(b) and 3110.06 through .09.

In another example, if during a meeting that includes more than 25 retail investors, a representative uses the chat feature to post an electronic file containing content that promotes a new mutual fund, the content in the file meets the definition of a retail communication in FINRA Rule 2210(a)(5). Because the content in the file promotes a product of the firm, a registered principal must have approved it prior to use as required by FINRA Rule 2210(b)(1)(A). In addition, because the content in the file promotes a specific registered investment company (i.e., the mutual fund), the firm must also submit it to FINRA's Advertising Regulation Department within 10 business days of first use as required by FINRA Rule 2210(c)(3). In contrast, if during an online meeting that includes more than 25 retail investors, a representative responds to a live audience question by using the platform's whiteboarding feature to draw a diagram illustrating the differences between a conventional bond and a stock, that content would meet the definition of a retail communication in FINRA Rule 2210(a)(5). However, because the representative created and posted the whiteboarding content during an online interactive electronic forum, the firm would not have to approve such content prior to use (see FINRA Rule 2210(b)(1)(D)(ii)). Instead, the firm may review the whiteboarding content in the same manner as required for supervising and reviewing correspondence pursuant to FINRA Rule 3110(b) and 3110.06 through .09.

As a final example, a representative of an ETF broker-dealer distributor hosts a webinar attended by 100 registered representatives of other broker dealers. During the presentation, the distributor representative conducts an interactive poll about the latest ETF offered by the distributor. Once the poll is complete, the distributor representative posts the results live to all of the attendees. Because the audience is composed solely of registered representatives, the poll and the results would meet the definition of institutional communication in FINRA Rule 2210(a)(3). As such, the distributor would need to review the poll and the results in accordance with the firm's written supervisory procedures for the supervision of institutional communications adopted in accordance with FINRA Rule 2210(b)(3). While such procedures don't require review of all institutional communications prior to first use, they must include provisions for the education and training of associated persons as to the firm's procedures governing institutional communications, documentation of such education and training, and surveillance and follow-up to ensure that firm personnel implement and adhere to such procedures.

Posted: 9/30/21

F.1.4 Q. If a third party, such as a fund distributor or program sponsor, presents information or speaks with clients during a presentation, either in person or using an online conferencing platform, during which a representative of a broker-dealer also speaks or presents, what must the representative disclose about that third party?

A. FINRA Rule 2210(f)(1) provides that, when participating in unscripted public appearances, associated persons of broker-dealers must follow the standards of FINRA Rule 2210(d)(1). Paragraph (d)(1)(A) requires firms' communications with the public to be fair and balanced, and prohibits the omission of material information that would cause the communication to be misleading. To comply with these obligations, when a registered representative appears at an event along with personnel from a third party, such as a fund distributor or program sponsor, the representative should clearly explain the purpose of the meeting, the identity of the third-party entity, whether the third-party entity paid for or sponsored the meeting, and the relationship between the representative, the broker-dealer, and the third-party entity. [21]

Posted: 9/30/21

F.1.5 Q. If our registered representatives use communications with the public that direct customers to in-person or online presentations hosted by a third party, what supervision requirements apply?
A. A firm is responsible under FINRA Rule 2210 for third-party content if the firm has adopted or become entangled with such content. [22]

If a firm permits its representatives to direct investors to presentations hosted by a third party that concern securities products or services, FINRA would consider the firm to have adopted that content. Accordingly, the firm would need to ensure compliance with the content and supervision standards addressed above.

In addition, even if a firm or its representatives did not direct customers to attend the third-party hosted presentation, where the firm or representative paid for, arranged for, or was otherwise involved in the presentation, FINRA would consider the firm or representative to be entangled with the presentation. Accordingly, FINRA would treat the presentation as a communication with the public by the firm. 23 Again, under such circumstances, the firm would need to ensure compliance with the content, and supervision standards addressed above.

Posted: 9/30/21

F2. Firm Name

F.2.1. Q. Is a registered representative required to disclose the firm's name during a public appearance?
A. The requirement in FINRA Rule 2210(d)(3) to disclose a firm's name applies to retail communications and correspondence. Accordingly, sales scripts, slide presentations and brochures used in connection with a public appearance must disclose the firm's name. A registered representative is not required to disclose the firm's name as part of non-scripted, extemporaneous remarks during a public appearance.

Posted: 1/7/13

G. SEC Advertising Rules

G.1. SEC Rule 482

G.1.1 Q. Does a promotional item, such as a t-shirt, cap or pen, that contains only the name of a mutual fund or fund family, have to include the prospectus offering legend required by SEC Rule 482 under the Securities Act?
A. No. In FINRA's view, promotional items that only contain the name of a mutual fund or fund family would not be considered an "advertisement" for purposes of Rule 482, and therefore, are not subject to the requirements of that rule, including the requirement to include a prospectus offering legend.

Posted: 5/22/15

G.1.2. Q. Is a communication to a customer that lists the customer's securities and other investments held at a firm, or at various broker-dealers, investment advisers and other entities, and the performance of those investments, subject to Rule 482 or Rule 34b-1 under the Investment Company Act of 1940?
A. No. In FINRA's view, assuming the communication merely informs an existing customer of his or her securities holdings and other investment positions held at the firm or at multiple intermediaries, and the prior performance of those investments, and it does not offer securities of a registered investment company, we believe that the communication would not be considered an advertisement for purposes of Rule 482 and Rule 34b-1. However, if the communication explicitly or implicitly induces the purchase of shares of a registered investment company, we believe that the communication could be subject to the requirements of Rule 482 and Rule 34b-1.

Posted: 5/22/15

---

1. See FINRA Rule 2241(a)(3), (a)(14), (h)(1), (h)(3), and (h)(5).

2. Unless FINRA specifically directs a firm to file its institutional communications pursuant to FINRA Rule 2210(c)(1)(B), a firm is not required to file its institutional communications with the Advertising Regulation Department. If a firm chooses voluntarily to file a third-party research report that qualifies as an institutional communication, however, an appropriately qualified principal must approve the report prior to filing. See FINRA Rule 2210(b)(1)(F).

3. See also letter from Afshin Atabaki, FINRA, to Wallace W. Kunzman, Jr. (December 1, 2014).

4. See FINRA Rule 2210(c)(7)(F).

5. "Responsive web design" refers to technology that changes the display of a web page in response to the needs of users and the devices they're using. The layout may change based on the size and capabilities of the device. For example, on a phone, users would see content shown in a single column view; a tablet might show the same content in two columns. See "Responsive Web Design Basics."

6. Pursuant to FINRA Rule 2210(c)(7)(B), the firm also would not be required to file future versions of the fund fact sheets (such as fact sheets issued after the end of the next calendar quarter) where the changes are limited to updates of more recent statistical or other non-narrative information and non-predictive narrative information that describes market events during the period covered by the communication or factual changes in portfolio composition or is sourced from a registered investment company's regulatory documents filed with the SEC.

7. For example, FINRA has stated that firms are not required to file information, including performance information, provided to participant-directed individual account plan participants pursuant to DOL Rule 404a-5 under ERISA. See Regulatory Notice 12-02 (January 2012).

8. See *Regulatory Notices 07-59 (FINRA Guidance Regarding Review and Supervision of Electronic Communications) and 10-06 (Guidance on Blogs and Social Networking Web Sites)* for additional guidance on supervision of digital correspondence.

9. FINRA Rule 2210(c)(7)(I) excludes from the filing requirements any reprint or excerpt of any article or report issued by a publisher, provided that (i) the publisher is not an affiliate of the member using the reprint or any underwriter or issuer of a security mentioned in the reprint that the member is promoting; (ii) neither the member using the reprint nor any underwriter or issuer of a security mentioned in the reprint has commissioned the reprinted article or report; and (iii) the member using the reprint has not materially altered its contents except as necessary to make the reprint consistent with applicable regulatory standards or to correct factual errors.

10. The SEC staff has taken the position, however, that certain interactive content posted on a real-time electronic forum (i.e., chat rooms or other social media) should be filed under the filing requirements of Section 24(b) of the Investment Company Act of 1940 or Rule 497 under the Securities Act of 1933 (Securities Act), even if it is not required to be filed with FINRA under FINRA Rule 2210. See U.S. Securities and Exchange Commission, Division of Investment Management, IM Guidance Update No. 2013-01 (March 2013).

11. See *Notice to Members 06-48* (September 2006).

12. The Hartford Letter defined "Related Performance Information" as "actual performance of all separate or private accounts or funds that have (i) substantially similar investment policies, objectives, and strategies, and (ii) are currently managed or were previously managed by the same adviser or sub-adviser that manages the registered mutual fund that is the subject of an institutional communication."

13. The Hartford Letter defined "Related Accounts" as all separate or private accounts or funds that fall within the definition of "Related Performance Information."

14. FINRA Rule 2210(d)(1)(B) states, "No member may make any false, exaggerated, unwarranted, promissory or misleading statement or claim in any communication. No member may publish, circulate or distribute any communication that the member knows or has reason to know contains any untrue statement of a material fact or is otherwise false or misleading."

15. The June 1997 Issue of NASD's *Regulatory and Compliance Alert* included an "Ask the Analyst" question and answer regarding banner advertisements. The answer indicated that a banner advertisement that contained a truthful claim regarding mutual funds (and that did not contain promissory language or graphics) could comply with the Rules by hyperlinking to a webpage containing the information necessary to provide a sound basis to evaluate the facts regarding the mutual funds. FINRA has extended this approach to other electronic communications such as interactive social media posts.

16. See *Regulatory Notice 17-18 (Guidance on Social Networking Websites and Business Communications)*.

17. See Investment Advisers Act Rule 206(4)-1(a)(4); see also Investment Advisers Act Release No. 5653 (December 22, 2020), 86 FR 13024 (March 5, 2021) ("Marketing Rule Adopting Release"), codified at 17 CFR 275.206(4)-1.

18. In particular, the Marketing Rule Adopting Release states that, "[s]o long as each layer of a layered advertisement complies with the requirement to provide benefits and risks in a fair and balanced manner, providing hyperlinks to additional content would meet the requirement of [the Rule]." See Marketing Rule Adopting Release, 86 FR at 13044 and note 239.

19. For details, see *Global Investment Performance Standards (GIPS) For Firms* (2020), *GIPS Standards Handbook for Firms* (2020) and *FINRA Regulatory Notice 20-21 and the GIPS Standards* (video).

20. For specific details on the requirements of this limited exception, see Memorandum RE: FINRA's Regulatory Notice 20-21 and References to the GIPS Standards.

21. See *Regulatory Notice 07-43 (Senior Investors)* and *Protecting Senior Investors: Report of Examinations of Securities Firms Providing "Free Lunch" Sales Seminars* for a discussion of effective practices regarding sales seminars.

22. See, e.g., *Regulatory Notice 17-18 (Guidance on Social Networking Websites and Business Communications)*.

23. See *Regulatory Notice 10-06 (Guidance on Blogs and Social Networking Web Sites)* for a discussion of the "adoption" and "entanglement" theories as they apply to third-party content.

^ Back to top


What and When to File

Definitions

1. What are the categories that make up communications with the public?

FINRA Rule 2210 defines three categories of communications:

- **Retail communication** consists of any written (including electronic) communication that is distributed or made available to **more than 25 retail investors within any 30 calendar-day period**. A retail investor is any person other than an institutional investor, regardless of whether the person has an account with the firm.
- **Correspondence** consists of any written (including electronic) communication distributed or made available to **25 or fewer retail investors within any 30 calendar-day period**.
- **Institutional communication** means any written (including electronic) communication that is distributed or made available only to institutional investors as defined but does not include a firm's internal communications. Institutional investors include banks, savings and loan associations, insurance companies, registered investment companies, registered investment advisors, a person or entity with assets of at least $50 million, government entities, employee benefit plans and qualified plans with at least 100 participants, FINRA member firms and registered persons, and a person acting solely on behalf of an institutional investor.

  If a firm has reason to believe that a communication intended for institutional investors will be forwarded to or made available to a person that is not an institutional investor, the communication must not be treated as an institutional communication. Note that individual participants of employee benefit plans and qualified plans are not considered institutional investors.

Internal Approval

^ Back to top

1. What are the approval requirements for retail communications?

FINRA Rule 2210(b) requires that all retail communications must be approved by an appropriately qualified registered principal before the earlier of its use or filing with FINRA's Advertising Regulation Department.

2. Are there any exceptions to the principal approval requirement for retail communications?

A registered principal does not need to approve any retail communication that has already been filed with FINRA and that FINRA has deemed consistent with applicable standards, provided the communication has not been materially altered.

In addition, prior to use, approval is not required if a firm supervises and reviews the following types of retail communications in the same manner as correspondence pursuant to FINRA Rule 3110(b) and 3110 Supplementary Material .06 through .09:

- any retail communication that does not make any financial or investment recommendation or otherwise promote a product or service of the member.
- any retail communication that is posted on an online interactive electronic forum.
- Any retail communication that is excepted from the definition of "research report" pursuant to FINRA Rule 2241(a)(11(A) and 2242(a)(3)(A).

Filing Requirements

^ Back to top

1. What communications must be filed with FINRA prior to use?

The following retail communications must be filed at least 10 business days prior to first use or publication:

- retail communications of new member firms used in any electronic or public media for one year beginning on the date the firm's FINRA membership becomes effective, as reflected in the CRD system. For example, this requirement applies to any generally accessible website; newspaper, magazine, telephone directory or other advertisements; television or radio commercials; telephone or audio recordings; video displays, signs or billboards; and motion pictures;

- retail communications that include rankings or performance comparison information that is not generally published or that is created by the investment company;
- security futures retail communications; and
- retail communications concerning options used prior to delivery of the options disclosure document must be filed 10 **calendar** days prior to use.

2. What communications must be filed with FINRA *within 10 business days?*

The following retail communications must be filed within 10 business days of use:

- registered investment company retail communications that promote or recommend a specific registered investment company or family of registered investment companies;
- retail communications concerning any structured or derivative product registered under the Securities Act;
- retail communications concerning public direct participation programs;
- retail communications concerning collateralized mortgage obligations registered under the Securities Act;
- final filmed versions of television and video communications previously filed in draft form.

See "What and When to File with Advertising Regulation."

3. What communications do not need to be filed with FINRA?

The filing requirements do not apply to institutional communications and correspondence.

4. Must all retail communications be filed with FINRA?

No, some retail communications are excluded from the filing requirements. However, it is important to note that whether a communication is subject to filing or not, firms must ensure that all their communications regarding financial products and services comply with applicable FINRA, SEC, MSRB and SIPC rules.

The following retail communications are excluded from the filing requirements:

- communications that refer to types of investments solely as a listing of the products or services offered by the firm;
- retail communications that do not make any financial or investment recommendation or promote a product or service of the firm;
- prospectuses, preliminary prospectuses, fund profiles, offering circulars, annual and semi-annual reports and similar documents filed with the SEC or any state in compliance with applicable requirements as well as offering documents concerning securities exempt from such filing or registration including free writing prospectuses exempt from filing with the SEC. Note: When reviewing a filed communication, FINRA staff may request, or members may provide the relevant product prospectus;
- previously-filed retail communications that are used without material change;
- retail communications based on previously filed templates, with changes limited to updates of more recent statistical or other non-narrative information and non-predictive narrative information that describes market events during the periods covered by the communication or sourced from the investment company's regulatory documents filed with the SEC;
- retail communications posted on an online interactive electronic forum;
- press releases issued by NYSE-listed, closed-end investment companies as required by section 202.06 of the NYSE Listed Company Manual;
- retail communications subject to SEC Rule 134 and matter of record announcements regarding participation in a private placement (except for those related to public DPPs or registered investment company securities);
- press releases made available only to the members of the media;
- any reprint or excerpt of an article issued by a publisher that has not been materially altered in content except to comply with regulatory standards or correct errors and when the member has not commissioned the reprint and is not affiliated with the publisher; and
- retail communications that do no more than identify the member or offer a specific security at a stated price.

5. Can communications be filed voluntarily?

Yes, firms may voluntarily file communications for review by FINRA. Some reasons for filing voluntarily include:

- new product launch;
- use of a new format or medium, such as the firm's first television commercial or the firm's first mobile application;
- address compliance questions; and
- rule changes.

6. What information should accompany filings of ghostwritten communications on behalf of third party vendors?

FINRA understands that some firms file ghostwritten communications on behalf of third party vendors for review. In order to facilitate these reviews, firms should disclose to FINRA that the communications were created by a third party vendor which may market them to other firms. Firms are reminded that Regulatory Notice 08-27 provides guidance about the use of ghostwritten communications.

^ Back to top

How to File

1. How do I file communications for review by FINRA?
Firms file most communications for review using the Advertising Regulation Electronic Files (AREF) system. You may also call the Advertising Regulation Department at (240) 386-4500 to learn more about how to file using AREF.

2. How will FINRA respond to communications that firms submit for review?
FINRA provides a written "Review Letter" electronically via the AREF system. The Review Letter provides necessary comments as to the compliance of the submission. In addition, the review letter documents the cost of the review.

Our expedited review service provides for a response within three business days (or other negotiated time period) after the day FINRA receives the material. FINRA will send expedited responses no later than close of business on the third review day. However, response time for regular submissions may vary depending on the volume of filings FINRA receives.

3. What are the filing fees for the submission of communications to FINRA?
As set forth in Section 13, Schedule A of the FINRA By-laws, the following fees apply to each communication submitted:

Regular Filings:

- $ 125.00 for the first ten pages of material
- $ 10.00 for each additional page
- $ 125.00 for the first ten minutes of each video and audio item
- $ 10.00 for each additional minute of each video and audio item

Expedited Filings:

- $600.00 for all requests for expedited review for the first ten pages/minutes
- $ 50.00 per page/minute in excess of the first ten pages/minutes

4. How are filing fees paid?
Each month, your firm's Super Account Administrator will receive an email notification that an Advertising Regulation invoice is available in E-Bill via FINRA Gateway. The Advertising Regulation Invoice will provide detailed transaction charges incurred during the billing period along with the total amount due. You may pay your Advertising Regulation fling fees online using E-Bill:

A. Firm Bank Account (ACH payment)
B. Credit Card Payment (Visa, MasterCard or American Express)

In addition, there are three other payment methods

A. **FINRA Flex-Funding Account**

The FINRA Flex-Funding Account, formerly known as the CRD/IARD Daily Account, allows firms to view invoices and pay fees formerly paid through the Web CRD system.

B. **Wire Payments**

Funds may be wired for payment of filing fees. To pay Advertising invoices by wire transfers, provide your bank with the following information:

Bank Name: Bank of America
Transfer funds to: FINRA
Wire ABA Number: 026009593
ACH ABA Number: 054001204
Beneficiary: FINRA

Invoice Number

C. **Check Payment**

Checks can be sent by regular mail or by courier/overnight delivery. Checks sent by regular mail must be sent to the P.O. Box address provided below. All checks sent by courier or overnight delivery **must** be sent to the alternative address provided below, as the P.O. Box address **will not** accept courier or overnight deliveries. We encourage the use of the P.O. Box address as it facilitates more timely automated processing of your remittance.

Include the invoice number on the check and send the payment to:

FINRA
P.O. Box 418911
Boston, MA 02241-8911

(Note: P.O. Box does not accept overnight/courier deliveries)

For courier/overnight CHECKS only:

Bank of America Lockbox Services
FINRA 418911
MA5-527-02-07
2 Morrissey Blvd.
Dorchester, MA 02125

Please contact the Finance billing department with questions about your Advertising Regulation Invoice at (240) 386-5397.

5. How do I access additional information about my Advertising Regulation fee transactions?
Firms may view online in AREF a real time listing of current and past transactions. If your firm incurred filing fees prior to December 2012, you may also view historical Advertising Regulation Fee Account statements.

6. How do I contact the Department?
Our contact information is:

FINRA
Advertising Regulation Department
9509 Key West Avenue
Rockville, MD 20850-3389

Telephone: (240) 386-4500
Fax: (240) 386-4568
FINRA_ADV@FINRA.org

Regulatory Notice 11-39

Social Media Websites and the Use of Personal Devices for Business Communications

Guidance on Social Networking Websites and Business Communications

Executive Summary

In January 2010, FINRA issued *Regulatory Notice 10-06*, providing guidance on the application of FINRA rules governing communications with the public to social media sites and reminding firms of the recordkeeping, suitability, supervision and content requirements for such communications. Since its publication, firms have raised additional questions regarding the application of the rules. This *Notice* responds to these questions by providing further clarification concerning application of the rules to new technologies. It is not intended to alter the principles or the guidance provided in *Regulatory Notice 10-06*.

Questions concerning this *Notice* may be directed to:

- Joseph E. Price, Senior Vice President, Advertising Regulation/Corporate Financing, at (240) 386-4623;
- Thomas A. Pappas, Vice President, Advertising Regulation, at (240) 386-4553; or
- Amy Sochard, Director, Advertising Regulation, at (240) 386-4508.

August 2011

Notice type:
- Guidance

Suggested Routing
- Advertising
- Compliance
- Legal
- Operations
- Registered Representative
- Senior Management

Key Topics
- Communications With the Public
- Personal Electronic Devices
- Recordkeeping
- Social Networking Websites
- Supervision

Referenced Rules & Notices
- NASD Rule 2210
- NASD Rule 2211
- NASD Rule 3010
- FINRA Rule 4511
- NTM 05-48
- Regulatory Notice 08-77
- Regulatory Notice 10-06
- Regulatory Notice 11-14
- SEA Rule 17a-3
- SEA Rule 17a-4

FINRA
Financial Industry Regulatory Authority

Background

1. Recordkeeping

The obligations of a firm to keep records of communications made through social media depend on whether the content of the communication constitutes a business communication. Rule 17a-4(b) under the Securities Exchange Act of 1934 (SEA) requires broker-dealers to preserve certain records for a period of not less than three years, the first two in an easily accessible place.[1] Among these records, pursuant to SEA Rule 17a-4(b)(4), are "[o]riginals of all communications received and copies of all communications sent (and any approvals thereof) by the member, broker or dealer (including inter-office memoranda and communications) relating to its business as such, including all communications which are subject to rules of a self-regulatory organization of which the member, broker or dealer is a member regarding communications with the public."[2] The SEC has stated that the content of an electronic communication determines whether it must be preserved.[3]

2. Supervision

NASD Rule 3010 requires each firm to establish and maintain a system to supervise the activities of each associated person that is reasonably designed to achieve compliance with applicable federal securities laws and FINRA rules. As part of this responsibility, a registered principal must review prior to use any social media site that an associated person intends to employ for a business purpose. The registered principal may approve use of the site for a business purpose only if the registered principal has determined that the associated person can and will comply with all applicable FINRA rules, the federal securities laws, including recordkeeping requirements, and any additional requirements established by the firm.

The registered principal must review an associated person's proposed social media site in the form in which it will be "launched." Some firms require a registered principal to review the first posting by an associated person on an interactive forum within the site. This approach can help to ensure that the registered principal will be reviewing not only the initial communication, but the social media site itself in its completed design.

FINRA considers unscripted participation in an interactive electronic forum to come within the definition of "public appearance" under NASD Rule 2210. Public appearances do not require prior approval by a registered principal. Firms may adopt risk-based supervisory procedures utilizing post-use review, including sampling and lexicon-based search methodologies, of unscripted participation in an interactive electronic forum. The procedures a firm adopts must be reasonably designed to ensure that interactive electronic communications do not violate FINRA or SEC rules, including the content requirements of NASD Rule 2210, such as the prohibition on misleading statements or claims and the requirement that communications be fair and balanced. A static posting is deemed an "advertisement" under NASD Rule 2210 and therefore requires a registered principal to approve the posting prior to use.[4]

3. Links to Third-Party Sites

Firms may not establish a link to any third-party site that the firm knows or has reason to know contains false or misleading content. A firm should not include a link on its website if there are any red flags that indicate the linked site contains false or misleading content. Additionally, a firm is responsible under NASD Rule 2210 for content on a linked third-party site if the firm has adopted or has become entangled with its content. For example, a firm may be deemed to have "adopted" third-party content if it indicates on its site that it endorses the content on the third-party site. A firm could be deemed to have become "entangled" with a third-party site if, for example, it participates in the development of the content on the third-party site.

4. Data Feeds

Firms must adopt procedures to manage data feeds into their own websites. FINRA is aware of situations in which firms have received data feeds that were inaccurate. Firms must be familiar with the proficiency of the vendor of the data and its ability to provide data that is accurate as of the time it is presented on the firm's website. Firms also must understand the criteria followed by vendors in gathering or calculating the types of data that the firm intends to feed into its website, in order to determine whether the vendor is performing this function in a reasonable manner.[5] Firms also should regularly review aspects of these data feeds for any red flags that indicate that the data may not be accurate, and should promptly take necessary measures to correct any inaccurate data.

Questions & Answers

Recordkeeping

Q1: Does determining whether a communication is subject to the recordkeeping requirements of SEA Rule 17a-4(b)(4) depend on whether an associated person uses a personal device or technology to make the communication?

A1: SEA Rule 17a-4(b)(4) requires a firm to retain records of communications that relate to its "business as such." Whether a particular communication is related to the business of the firm depends upon the facts and circumstances. This analysis does not depend upon the type of device or technology used to transmit the communication, nor does it depend upon whether it is a firm-issued or personal device of the individual; rather, the content of the communication is determinative. For instance, the requirement would apply if the electronic communication was received or sent by an associated person through a third-party's platform or system. A firm's policies and procedures must include training and education of its associated persons regarding the differences between business and non-business communications and the measures required to ensure that any business communication made by associated persons is retained, retrievable and supervised.

Q2: When an associated person posts autobiographical information, such as place of employment or job responsibilities, does this information constitute a business communication?

A2: As discussed in question 1 above, firms must develop policies and procedures that include training regarding the difference between business and non-business communications to enable appropriate compliance. In certain contexts, such as sending a resume to a potential employer, the communication could be viewed as not relevant to the business of the firm. In other contexts, such as posting a list of products or services offered by the firm, the communication likely will be viewed as a business communication.

Q3: May a firm or associated person sponsor a social media site or use a communication device that includes technology which automatically erases or deletes the content?

A3: No. Technology that automatically erases or deletes the content of an electronic communication would preclude the ability of the firm to retain the communications in compliance with their obligations under SEA Rule 17a-4. Accordingly, firms and associated persons may not sponsor such sites or use such devices.

Q4: Do the recordkeeping requirements apply to third-party posts to a firm or an associated person's social media sites if the firm or the individual has not adopted or become entangled with the post?

A4: *Regulatory Notice 10-06* addresses the application of NASD Rule 2210 to third-party posts on a social media site established by a firm or its associated persons. Unless the firm or its associated persons have adopted or become entangled with the post, FINRA generally does not treat third-party posts as the firm's or its associated persons' communications under the rule. The recordkeeping requirements, however, require retention of the records of all communications received by a firm or its associated persons relating to its business as such.

Q5: Do the recordkeeping requirements differ for static and interactive communications?

A5: They do not—the recordkeeping requirements are governed by the content of the communication. As noted above, the FINRA *supervision* requirements differ for static and interactive communications.

Supervision

Q6: Can interactive content become static?

A6: Yes. For example, interactive content could be copied or forwarded and posted in a static forum, such as a blog or static area of a Web page, in a manner that renders it static content. It then would constitute an advertisment under NASD Rule 2210, requiring prior approval by a registered principal of the firm.

Q7: What measures should a firm adopt to monitor compliance with its social media policies?

A7: A firm must conduct appropriate training and education concerning its policies, including those relating to social media. Firms must follow up on "red flags" that may indicate that an associated person is not complying with firm policies. Some firms require each associated person to certify on an annual or more frequent basis that the associated person is acting in a manner consistent with such policies. When feasible, some firms also have chosen to randomly spot check websites to help them monitor compliance with firm policies.

Q8: Must material changes to static content posted by a firm or its associated persons on a social media site that contains business communications receive prior approval by a registered principal?

A8: NASD Rule 2210(1)(b) requires a registered principal to approve each advertisement and item of sales literature before the earlier of its use or filing with FINRA's Advertising Regulation Department. NASD Rule 2210(c)(8) excludes from the filing requirements any advertisement or sales literature that previously had been filed and that is to be used "without material change." Firms are expected to adopt procedures requiring prior registered principal approval of any advertisement or sales literature that has been materially changed, even if it had been previously approved in an earlier version. For example, changes in the description of the advantages of investing in the advertised product or of its risks would typically require registered principal prior approval. Since static content posted by a firm or its associated persons on a social media site that contains business communications is considered to be an advertisement, these procedures must apply to such static content.

Third-Party Posts, Third-Party Links and Websites

Q9: If a third party posts a business-related communication, such as a question about a security, on an associated person's personal social media site, may the associated person respond to the communication?

A9: Yes, provided that the response does not violate the firm's policies concerning participation on a personal social media site. If a firm has a policy that associated persons may not use a personal social media site for business purposes, then a substantive response by the associated person would violate this policy.[6] Some firms permit a non-substantive response, and pre-approve statements that their associated persons may make to respond to such posts and that direct the third party to other firm-approved communication media, such as the firm's email system.

Q10: To what extent is a firm responsible for any third-party website that the firm or its associated person "co-brands"?

A10: Under NASD Rule 2210, a firm that co-brands any part of a third-party site, such as by placing the firm's logo prominently on the site, is responsible for the content of the entire site. Under these circumstances, FINRA considers the firm to have adopted the content on that site. A firm is responsible under NASD Rule 2210 for content on a linked third-party site if the firm has adopted or become entangled with its content. *Regulatory Notice 10-06* describes the "adoption" and "entanglement" theories as they apply to third-party posts on a firm's social media sites. FINRA considers a firm to have adopted content in a third-party post if the firm or its personnel explicitly or implicitly endorse or approve the post.

Q11: When is a firm *not* responsible for the content on a third-party site to which it links?

A11: A firm may establish a link to the site of an independent third party without assuming responsibility for the content of that site under NASD Rule 2210 if:

- the firm does not "adopt" or become "entangled" with the content of the third-party site; and
- the firm does not know or have reason to know that the site contains false or misleading information.

Q12: If firm policy requires deletion of inappropriate third-party content, will the firm be considered to have adopted any third-party posts that are not deleted?

A12: No. The fact that the firm has a policy of routinely blocking or deleting certain types of content in order to ensure the content is appropriate would not mean that the firm had adopted the content of the posts left on the site. For example, most firms using social media sites block or screen offensive material. Such a policy would not indicate that the firm has adopted the remaining third-party content.

Q13: Does NASD Rule 2210 require firms to approve or maintain records of statistical information that the firm has regularly updated on its website?

A13: NASD Rule 2210(b)(1) requires that a registered principal approve each advertisement and item of sales literature prior to use or filing with FINRA's Advertising Regulation Department. NASD Rule 2210(b)(2) requires firms to maintain all advertisements and sales literature, including the names of the persons who prepared them or approved their use, for a period beginning on the date of first use and ending three years from the date of last use.

Statistical information that is posted on a firm's website would be considered an "advertisement" subject to the approval and recordkeeping requirements of NASD Rules 2210(b)(1) and (2). However, some firms establish templates for the presentation of this data, and subject these templates to those provisions. The data that is fed into the website in accordance with such a template would not be subject to the requirements of NASD Rules 2210(b)(1) and (2). The firm must have procedures reasonably designed to ensure that the data can be verified to ensure that it is timely and accurate, and that the firm can promptly correct data that is erroneous when posted or becomes inaccurate over time.

Accessing Social Media Sites From Personal Devices

Q14: May associated persons use personal communication devices and other equipment, such as a smart phone or tablet computer, to access firm business applications and perform business activity if the firm employs technology that enables the firm to keep records and supervise the activity?

A14: Yes. Firms may permit their associated persons to use any personal communication device, whether it is owned by the associated person or the firm, for business communications. FINRA recognizes that the development of new technologies can facilitate the ability of associated persons to perform their responsibilties and, in the case of registered representatives, to serve their clients. Of course, the firm must be able to retain, retrieve and supervise business communications regardless of whether they are conducted from a device owned by the firm or by the associated person.

In order to ensure that the business communications are readily retrievable without necessitating the capture of personal communications made on the same device, firms should have the ability to separate business and personal communications, such as by requiring that the associated persons use a separately identifiable application on the device for their business communications. If possible, this application should provide a secure portal into the firm's own communication system, particularly if confidential customer information may be shared. If the firm has the ability to separate business and personal communications, and has adequate electronic communications policies and procedures regarding usage, then the firm is not required to supervise the personal emails made on these devices. Of course, firms also are free to treat all communications made through the personal communication device as business communications.

Endnotes

1. SEA Rule 17a-4(f) permits broker-dealers to maintain and preserve these records on "micrographic media" or by means of "electronic storage media," as defined in the rule and subject to a number of conditions.

2. *See also* NASD Rule 2210(b)(2) (requiring the retention of all advertisements, sales literature and independently prepared reprints), NASD Rule 2211(b)(2) (requiring the retention of institutional sales material) and NASD Rule 3010(d)(3) (requiring the retention of correspondence of registered representatives).

3. *See* Reporting Requirements for Brokers or Dealers under the Securities Exchange Act of 1934, SEC Rel. No. 34-38245 (Feb. 5, 1997).

4. FINRA has filed with the SEC a proposed rule change that would replace most of the NASD and NYSE rules governing communications with the public with a series of new FINRA rules. *See* SR-FINRA-2011-035. Among other changes, the term "advertisement" would be subsumed within a new communication category, "retail communication."

5. *Cf.*, *Regulatory Notice 08-77* (Dec. 2008) (Customer Account Statements) (discussion of "data vendors"). *See also Notice to Members (NTM) 05-48* (July 2005) (Members' Responsibilities When Outsourcing Activities to Third-Party Service Providers); *Regulatory Notice 11-14* (March 2011) (FINRA Requests Comment on Proposed New FINRA Rule 3190 to Clarify the Scope of a Firm's Obligations and Supervisory Responsibilities for Functions or Activities Outsourced to a Third-Party Service Provider).

6. Of course, if the firm permits business-related communications on a personal social media site, then the firm must supervise that site for compliance with applicable rules and the federal securities laws.

Regulatory Notice 10-06

Social Media Web Sites

Guidance on Blogs and Social Networking Web Sites

Executive Summary

Americans are increasingly using social media Web sites, such as blogs and social networking sites, for business and personal communications. Firms have asked FINRA staff how the FINRA rules governing communications with the public apply to social media sites that are sponsored by a firm or its registered representatives. This *Notice* provides guidance to firms regarding these issues.

Questions concerning this *Notice* may be directed to:

- Joseph E. Price, Senior Vice President, Advertising Regulation/ Corporate Financing, at (240) 386-4623; or
- Thomas A. Pappas, Vice President and Director, Advertising Regulation, at (240) 386-4500.

Background

According to a recent report by the Pew Internet and American Life Project, 46 percent of American adults who use the Internet logged onto a social networking site in 2009, which is up from 8 percent in 2005.[1] Other studies have shown that use of social media sites by businesses to communicate with customers and the public has grown significantly in the past few years.[2]

FINRA has provided guidance concerning particular applications of the communications rules to interactive Web sites in the past. For example, in March 1999, FINRA stated that a registered representative's participation in an Internet chat room is subject to the same requirements as a presentation in person before a group of investors.[3] This guidance was codified in 2003, when FINRA defined the term "public appearance" in NASD Rule 2210 to include participation in an interactive electronic forum.[4]

January 2010

Notice Type

- Guidance

Suggested Routing

- Advertising
- Compliance
- Legal
- Operations
- Registered Representative
- Senior Management

Key Topics

- Blogs
- Communications with the Public
- Recordkeeping
- Social Networking Web Sites
- Supervision

Referenced Rules & Notices

- ICA Section 24(b)
- NASD Rule 2210
- NASD Rule 2310
- NASD Rule 2711
- NASD Rule 3010
- NASD Rule 3070
- NASD Rule 3110
- NYSE Rule 351
- NYSE Rule 401A
- NYSE Rule 410
- NYSE Rule 472
- NTM 01-23
- NTM 03-33
- Regulatory Notice 07-59
- Regulatory Notice 09-55
- SEA Rule 17a-3
- SEA Rule 17a-4
- Securities Act Rule 482

FINRA
Financial Industry Regulatory Authority

FINRA also has provided guidance regarding the application of the communication rules in its *Guide to the Internet for Registered Representatives*,[5] and has released podcasts on these issues to help educate firms and their personnel.[6] Nevertheless, FINRA staff has continued to receive numerous inquiries from firms and others concerning how the FINRA rules governing communications with the public apply to the use of social media sites by firms and their registered representatives. Firms also have inquired regarding their recordkeeping responsibilities for communications posted on social media sites.

In September 2009, FINRA organized a Social Networking Task Force composed of FINRA staff and industry representatives to discuss how firms and their registered representatives could use social media sites for legitimate business purposes in a manner that ensures investor protection. Based on input from the Task Force and others, and further staff consideration of these issues, FINRA is issuing this *Notice* to guide firms on applying the communications rules to social media sites, such as blogs and social networking sites. The goal of this *Notice* is to ensure that—as the use of social media sites increases over time—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. At the same time, FINRA is seeking to interpret its rules in a flexible manner to allow firms to communicate with clients and investors using this new technology.

While many firms may find that the guidance in this *Notice* is useful when establishing their own procedures, each firm must develop policies and procedures that are best designed to ensure that the firm and its personnel comply with all applicable requirements. Every firm should consider the guidance provided by this *Notice* in the context of its own business and its compliance and supervisory programs.

This *Notice* only addresses the use by a firm or its personnel of social media sites for business purposes. The *Notice* does not purport to address the use by individuals of social media sites for purely personal reasons.

Questions & Answers

Recordkeeping Responsibilities

Q1: Are firms required to retain records of communications related to the broker-dealer's business that are made through social media sites?

A1: Yes. Every firm that intends to communicate, or permit its associated persons to communicate, through social media sites must first ensure that it can retain records of those communications as required by Rules 17a-3 and 17a-4 under the Securities Exchange Act of 1934 and NASD Rule 3110. SEC and FINRA rules require that for record retention purposes, the content of the communication is determinative and a broker-dealer must retain those electronic communications that relate to its "business as such."[7]

FINRA is aware that some technology providers are developing systems that are intended to enable firms to retain records of communications made through social media sites. Some systems might interface with a firm's network to capture social media participation and feed it into existing systems for the review and retention of email. Other providers are developing technology that might permit a registered representative working off-site to elect to access social media through platforms that will retain the communications on behalf of the firm.

Of course, it is up to each firm to determine whether any particular technology, system or program provides the retention and retrieval functions necessary to comply with the books and records rules. FINRA does not endorse any particular technology necessary to keep such records, nor is it certain that adequate technology currently exists.

Suitability Responsibilities

Q2: If a firm or its personnel recommends a security through a social media site, does this trigger the requirements of NASD Rule 2310 regarding suitability?

A2: Yes. Whether a particular communication constitutes a "recommendation" for purposes of Rule 2310 will depend on the facts and circumstances of the communication. Firms should consult *Notice to Members (NTM) 01-23* (Online Suitability) for additional guidance concerning when an online communication falls within the definition of "recommendation" under Rule 2310.

Various social media sites include functions that make their content widely available or that limit access to one or more individuals. Rule 2310 requires a broker-dealer to determine that a recommendation is suitable for every investor to whom it is made.

Q3: What factors should firms consider when developing procedures for supervising interactive electronic communications on a social media site that recommend specific investment products?

A3: Communications that recommend specific investment products often present greater challenges for a firm's compliance program than other communications. As discussed above, they may trigger the FINRA suitability rule, thus creating possible substantive liability for the firm or a registered representative. These communications must often include additional disclosure in order to provide the customer with a sound basis for evaluating the facts with respect to the product. They also might trigger other requirements under the federal securities laws.[8] FINRA has brought disciplinary actions regarding interactive electronic communications that contained misleading statements about investment products that the communications recommended.[9]

For these reasons, firms must adopt policies and procedures reasonably designed to address communications that recommend specific investment products. As a best practice, firms should consider prohibiting all interactive electronic communications that recommend a specific investment product and any link to such a recommendation unless a registered principal has previously approved the content.

Alternatively, many firms maintain databases of previously approved communications and provide their personnel with routine access to these templates. Firms might consider prohibiting communications that recommend a specific investment product unless the communication conforms to a pre-approved template and the specific recommendation has been approved by a registered principal. Firms also should consider adopting policies and procedures governing communications that promote specific investment products, even if these communications might not constitute a "recommendation" for purposes of our suitability rule or otherwise.

Types of Interactive Electronic Forums

The definition of "public appearance" in NASD Rule 2210 includes unscripted participation in an interactive electronic forum such as a chat room or online seminar. Rule 2210 does not require firms to have a registered principal approve in advance the extemporaneous remarks of personnel who participate in public appearances. However, these interactive electronic forums are subject to other supervisory requirements and to the content requirements of FINRA's communications rule.

Q4: Does a blog constitute an "interactive electronic forum" for purposes of Rule 2210?

A4: The treatment of a blog under Rule 2210 depends on the manner and purposes for which the blog has been constructed. Merriam-Webster's Online Dictionary defines "blog" as "a Web site that contains an online personal journal with reflections, comments, and often hyperlinks provided by the writer."[10] Historically, some blogs have consisted of static content posted by the blogger. FINRA considers static postings to constitute "advertisements" under Rule 2210. If a firm or its registered representative sponsors such a blog, it must obtain prior principal approval of any such posting. Today, however, many blogs enable users to engage in real-time interactive communications. If the blog is used to engage in real-time interactive communications, FINRA would consider the blog to be an interactive electronic forum that does not require prior principal approval; however, such communications must be supervised, as discussed below.[11]

Q5: Social networking sites, such as Facebook, Twitter and LinkedIn, typically include both static content and interactive functions. Are these sites interactive electronic forums for purposes of Rule 2210?

A5: Social networking sites typically contain both static and interactive content. The static content remains posted until it is changed by the firm or individual who established the account on the site. Generally, static content is accessible to all visitors to the site.

Examples of static content typically available through social networking sites include profile, background or wall information. As with other Web-based communications such as banner advertisements, a registered principal of the firm must approve all static content on a page of a social networking site established by the firm or a registered representative before it is posted.[12] Firms may use an electronic system to document these approvals.

Social networking sites also contain non-static, real-time communications, such as interactive posts on sites such as Twitter and Facebook. The portion of a social networking site that provides for these interactive communications constitutes an interactive electronic forum, and firms are not required to have a registered principal approve these communications prior to use. Of course, firms still must supervise these communications, as discussed below.

Supervision of Social Media Sites

Q6: How must firms supervise interactive electronic communications by the firm or its registered representatives using blogs or social networking sites?

A6: The content provisions of FINRA's communications rules apply to interactive electronic communications that the firm or its personnel send through a social media site. While prior principal approval is not required under Rule 2210 for interactive electronic forums, firms must supervise these interactive electronic communications under NASD Rule 3010 in a manner reasonably designed to ensure that they do not violate the content requirements of FINRA's communications rules.[13]

Firms may adopt supervisory procedures similar to those outlined for electronic correspondence in *Regulatory Notice 07-59* (FINRA Guidance Regarding Review and Supervision of Electronic Communications). As set forth in that *Notice*, firms may employ risk-based principles to determine the extent to which the review of incoming, outgoing and internal electronic communications is necessary for the proper supervision of their business.

For example, firms may adopt procedures that require principal review of some or all interactive electronic communications prior to use or may adopt various methods of post-use review, including sampling and lexicon-based search methodologies as discussed in *Regulatory Notice 07-59*. We are aware that technology providers are developing or may have developed systems that are intended to address both the books and records rules and supervisory procedures for social media sites that are similar or equivalent to those currently in use for emails and other electronic communications. FINRA does not endorse any particular technology. Whatever procedures firms adopt, however, must be reasonably designed to ensure that interactive electronic communications do not violate FINRA or SEC rules.

Firms are also reminded that they must have policies and procedures, as described in *Regulatory Notice 07-59*, for the review by a supervisor of employees' incoming, outgoing and internal electronic communications that are of a specific subject matter that require review under FINRA rules and federal securities laws, including:

- NASD Rule 2711(b)(3)(A) and NYSE Rule 472(b)(3), which require that a firm's legal and compliance department be copied on communications between non-research and research departments concerning the content of a research report;
- NASD Rule 3070(c) and NYSE Rule 351(d), which require the identification and reporting of customer complaints; NYSE Rule 401A requires that the receipt of each complaint be acknowledged by the firm to the customer within 15 business days; and

- NASD Rule 3110(j) and NYSE Rule 410, which require the identification and prior written approval of every order error and other account designation change.

Q7: What restrictions should firms place on which personnel may establish an account with a social media site?

A7: Firms must adopt policies and procedures reasonably designed to ensure that their associated persons who participate in social media sites 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. Firms must have a general policy prohibiting any associated person from engaging in business communications in a social media site that is not subject to the firm's supervision. Firms also must require that only those associated persons who have received appropriate training on the firm's policies and procedures regarding interactive electronic communications may engage in such communications.

As firms develop their policies, they should consider prohibiting or placing restrictions on any associated person who has presented compliance risks in the past, particularly compliance risks concerning sales practices, from establishing accounts for business purposes with a social media site. In its supervision of social networking sites, each firm must monitor the extent to which associated persons are complying with the firm's policies and procedures governing the use of these sites. Firms also should consider policies that address associated persons' continued use of such sites if the firm's supervisory systems demonstrate compliance risks. Firms should take disciplinary action if the firm's policies are violated.

Third-Party Posts

Q8: If a customer or other third party posts content on a social media site established by the firm or its personnel, does FINRA consider the third-party content to be the firm's communication with the public under Rule 2210?

A8: As a general matter, FINRA does not treat posts by customers or other third parties as the firm's communication with the public subject to Rule 2210. Thus, the prior principal approval, content and filing requirements of Rule 2210 do not apply to these posts.

Under certain circumstances, however, third-party posts may become attributable to the firm. Whether third-party content is attributable to a firm depends on whether the firm has (1) involved itself in the preparation of the content or (2) explicitly or implicitly endorsed or approved the content.

The SEC has referred to circumstance (1) above as the "entanglement" theory (*i.e.,* the firm or its personnel is entangled with the preparation of the third-party post) and (2) as the "adoption" theory (*i.e.,* the firm or its personnel has adopted its content).[14] Although the SEC has employed these theories as a basis for a company's responsibility for third-party information that is hyperlinked to its Web site, a similar analysis would apply to third-party posts on a social media site established by the firm or its personnel.

For example, FINRA would consider such a third-party post to be a communication with the public by the firm or its personnel under the entanglement theory if the firm or its personnel paid for or otherwise was involved with the preparation of the content prior to posting. FINRA also would consider a third-party post to be a communication with the public by the firm or its personnel under the adoption theory if, after the content is posted, the firm or its personnel explicitly or implicitly endorses or approves the post.[15]

Q9: Must a firm also use a disclaimer to inform customers that third-party posts do not reflect the views of the firm and have not been reviewed by the firm for completeness or accuracy?

A9: Assuming the disclaimer was sufficiently prominent to inform investors of the firm's position, such a disclaimer would be part of the facts and circumstances that FINRA would consider in an analysis of whether a firm had adopted or become entangled with a posting.

Q10: Must a firm monitor third-party posts?

A10: FINRA does not consider a third-party post to be a firm communication with the public unless the firm or its personnel either is entangled with the preparation of the third-party post or has adopted its content. Nevertheless, FINRA has found through its discussions with members of the Social Networking Task Force and others that many firms monitor third-party posts on firm Web sites. For example, some firms monitor third-party posts to mitigate the perception that the firm is adopting a third-party post, to address copyright issues or to assist compliance with the "Good Samaritan" safe harbor for blocking and screening offensive material under the Communications Decency Act.[16]

Some of the other best practices adopted by Task Force members include:

- establishing appropriate usage guidelines for customers and other third parties that are permitted to post on firm-sponsored Web sites;
- establishing processes for screening third-party content based on the expected usage and frequency of third-party posts; and
- disclosing firm policies regarding its responsibility for third-party posts.

Endnotes

1 *See* Amanda Lenhart, Pew Internet and American Life Project, *The Democratization of Online Social Networks* (Oct. 8, 2009), *http://fe01.pewinternet.org/Presentations/2009/41--The-Democratization-of-Online-Social-Networks.aspx*.

2 Sharon Gaudin, *Business Use of Facebook, Twitter Exploding*, Computerworld (Nov. 9, 2009), at *www.computerworld.com/s/article/9140579/Business_use_of_Twitter_Facebook_exploding*.

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

4 *See* NASD Rule 2210(a)(5).

5 *See Guide to the Internet for Registered Representatives,* at *www.finra.org/Industry/Issues/Advertising/p006118*.

6 *See* "Electronic Communications: Blogs, Bulletin Boards and Chat Rooms" (Feb. 23, 2009), and "Electronic Communications: Social Networking Web Sites" (Mar. 10, 2009) at *www.finra.org/ podcasts*.

FINRA is also hosting webinars on compliance considerations for social networking sites on February 3 and March 17, 2010. Find more information at *www.finra.org/webinars*.

7 *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).

8 For example, even if FINRA considers a communication made through an interactive electronic forum to be a public appearance, the SEC staff could still conclude that Rule 482 under the Securities Act of 1933 and the filing requirements of Section 24(b) of the Investment Company Act of 1940 apply to the communication. Accordingly, firms must consider these requirements in determining whether to permit interactive electronic communications that discuss registered investment companies.

9 For example, in a Default Decision dated November 23, 2009, FINRA fined and suspended a registered principal who held put options for himself and issued unapproved bulletin board messages that urged investors to sell the underlying stock. The bulletin board messages omitted material disclosure regarding his interest in the stock.

10 Merriam-Webster's Online Dictionary, definition of "blog," at *http://www.merriam-webster.com/dictionary/BLOG*.

11 The key to this distinction between whether a blog is considered an advertisement versus an interactive electronic forum is whether it is used to engage in real-time interactive communications with third parties. Thus, the mere updating of a non-interactive blog (or any other firm Web page) does not cause it to become an interactive electronic forum, even if the updating occurs frequently.

12 Currently, NASD Rule 2210(b) requires that a registered principal of a firm approve all advertisements and sales literature prior to use either electronically or in writing. FINRA has proposed amendments to this rule. These amendments would retain this prior to use principal approval requirement for "retail communications" as defined in the proposal. *See Regulatory Notice 09-55* (Sept. 2009).

Endnotes Continued

13 *See, e.g.,* March 1999 Ask the Analyst, *supra* note 3.

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 14, 65 Fed. Reg. 45870 n.78.

16 *See* 47 U.S.C. § 230(c).

Regulatory Notice 17-18

Social Media and Digital Communications

Guidance on Social Networking Websites and Business Communications

Summary

This *Notice* provides guidance regarding the application of FINRA rules governing communications with the public to digital communications, in light of emerging technologies and communications innovations.

Questions concerning this *Notice* may be directed to:

- Joseph E. Price, Senior Vice President, Advertising Regulation/Corporate Financing, at (240) 386-4623, *Joseph.Price@finra.org*;
- Thomas A. Pappas, Vice President, Advertising Regulation, at (240) 386-4553, *Tom.Pappas@finra.org*; or
- Amy C. Sochard, Senior Director, Advertising Regulation, at (240) 386-4508, *Amy.Sochard@finra.org*.

Background

Previously, FINRA issued *Regulatory Notice 10-06* and *Regulatory Notice 11-39* to provide guidance on the application of FINRA rules governing communications with the public to social media sites and the use of personal devices for business communications. The *Notices* also remind firms of the recordkeeping, suitability, supervision and content requirements for such communications. Effective February 4, 2013, FINRA adopted amendments to Rule 2210 that codify guidance provided in the *Notices* with respect to the supervision of interactive social media posts by member firms.[1] In December 2014, FINRA published the Retrospective Rule Review Report: Communications with the Public, which recommended that FINRA consider more guidance. This Notice provides further guidance. It is not intended to alter the principles or the guidance provided in prior *Regulatory Notices*.

April 2017

Notice Type
- Guidance

Suggested Routing
- Advertising
- Compliance
- Legal
- Marketing
- Operations
- Registered Representatives
- Senior Management

Key Topics
- Business Communications
- Communications with the Public
- Digital Communications
- Native Advertising
- Recordkeeping
- Social Media
- Supervision

Referenced Rules and Notices
- FINRA Rule 2210
- FINRA Rule 4511
- Regulatory Notice 08-27
- Regulatory Notice 10-06
- Regulatory Notice 11-39
- Regulatory Notice 15-50
- SEA Rules 17a-3 and 17a-4

FINRA®
Financial Industry Regulatory Authority

An October 2015 study from the Pew Research Center indicates that 65 percent of adults use social networking sites as compared to 7 percent in 2005.[2] Social media and other websites frequently enable the use of "native advertising," which has been defined as advertising content that matches the form and function of the platform on which it appears.[3] Media articles have predicted that within the next five years revenue earned from native advertising in online publications such as periodicals and social media sites will outstrip other forms of online display advertising.[4]

An April 2015 Pew Research Center report stated that based on a telephone survey of 2,002 adults conducted in December 2014, 64 percent of American adults own a smart phone of some kind.[5] The same report indicated that based on a sampling survey of 1,635 respondents, 97 percent of smartphone owners used text messaging at least once during the 10-day study period in November 2014 making it the most widely used basic feature or application. In April 2016, Facebook Messenger reported 900 million monthly active users, and WeChat reported in March 2016 that it had added nearly 200 million monthly active users in the previous year. Consistent with these trends, firms have increasingly raised new questions regarding the application of FINRA rules to social media and digital communications.

Past Guidance

Recordkeeping

Regulatory Notices 10-06 and *11-39* remind firms of their obligation to retain records of digital communications that relate to their "business as such" as required by Rule 17a-4(b)(4) under the Securities Exchange Act of 1934 (SEA).[6] *Regulatory Notice 11-39* notes that determining whether a communication must be retained depends on its content and not upon the type of device or technology used to transmit the communication. The Notice also reminds firms that they must train and educate their associated persons regarding the differences between business and non-business communications and the measures required to ensure any business communication made by associated persons is retained, retrievable and supervised.

Third-Party Posts

Regulatory Notice 10-06 states that, as a general matter, posts by customers or other third parties on social media sites established by a firm or its personnel do not constitute communications with the public by the firm or its associated persons under Rule 2210; therefore, the pre-use principal approval, content and filing requirements of the rule do not apply to these posts. The same principle is generally true of posts by customers or other third parties on any website established by a firm or its associated persons, regardless of whether the site is part of a social network.

There are exceptions. *Regulatory Notice 10-06* states that third-party posts on a firm or associated person's business website may constitute communications with the public by the firm or an associated person under Rule 2210 if the firm or an associated person has (1) paid for or been involved in the preparation of the content (which FINRA would deem to be "entanglement") or (2) explicitly or implicitly endorsed or approved the content (which FINRA would deem to be "adoption").[7]

Hyperlinks to Third-party Sites

Regulatory Notice 11-39 states that a firm may not establish a link to any third-party site that the firm knows or has reason to know contains false or misleading content and may not include a link on its website if there are any red flags that indicate the linked site contains false or misleading content. The *Notice* also advises firms that they are responsible under the communications rules for content on a linked third-party site if the firm has adopted or has become entangled with its content. For example, a firm may have "adopted" third-party content if the firm indicates that it endorses the content on the third-party site or may be "entangled" with a third-party site if, for example, it participates in the development of the content on the third-party site.

Questions & Answers

The following questions and answers provide guidance only with respect to FINRA rules and do not interpret the rules of the SEC or any other federal or state agency.

Text Messaging

Q1: Investors have sought to interact with registered representatives through text messaging applications ("apps") and chat services. Is a firm required to retain records of communications related to its business that are made through text messaging apps and chat services?

A: Yes. As with social media, every firm that intends to communicate, or permit its associated persons to communicate, with regard to its business through a text messaging app or chat service must first ensure that it can retain records of those communications as required by SEA Rules 17a-3 and 17a-4 and FINRA Rule 4511. SEC and FINRA rules require that, for record retention purposes, the content of the communication determines what must be retained.[8]

Personal Communications

Q2: If an associated person of a firm in a personal communication shares or links to content that the firm makes available in its communications that does not concern the firm's products or services, would the associated person's communication be subject to Rule 2210? For example, if the associated person posts information about the firm's sponsorship of a charitable event, a human interest article, an employment opportunity, or employer information covered by state and federal fair employment laws, would the communication be subject to Rule 2210?

A: No. Whether a communication by an associated person is subject to Rule 2210 depends on whether the content relates to the products or services of the firm.

Hyperlinks and Sharing

Q3: If a firm shares or links to specific content posted by an independent third-party such as an article or video, has the firm adopted the content?

A: By sharing or linking to specific content, the firm has adopted the content and would be responsible for ensuring that, when read in context with the statements in the originating post, the content complies with the same standards as communications created by, or on behalf of, the firm.

Q4: Based on the previous question and answer, if the shared or linked content itself contains links to other content, has the firm adopted the content available at these additional links?

A: Solely by sharing or linking to content that contains links, a firm would not be responsible for the content available at such links. Additional facts and circumstances will determine whether the firm has adopted or become entangled with such content. In general, if a firm shares or links to content that in turn links to other content over which the firm has no influence or control, the firm would not have adopted the other content. In contrast, if a firm shares or links to content that in turn links to other content over which the firm *has* influence or control, the firm would then have adopted that other content.

In addition, where the firm shares or links to content that itself serves primarily as a vehicle for links, or where content available through such links forms the entire basis of the article, the firm would have adopted the other content accessed through such links (*e.g.*, a firm reposts a microblog post that promotes content through a link, or a firm links to a webpage made up largely of a link or links to other content).

Q5: If a firm includes on its website a link to a section of an independent third-party website, has it adopted the content of the third-party website?

A: Whether a firm has adopted the content of an independent third-party website or any section of the website through the use of a link is fact dependent. Two factors are critical to the analysis: (1) whether the link is "ongoing" and (2) whether the firm has influence or control over the content of the third-party site.

The firm has not adopted the content if the link is "ongoing," meaning:

- the link is continuously available to investors who visit the firm's site;
- investors have access to the linked site whether or not it contains favorable material about the firm; and
- the linked site could be updated or changed by the independent third-party and investors would nonetheless be able to use the link.

However, if the firm has any influence or control over the content of the third-party site, then the firm would be entangled with its content. Further, language introducing the ongoing link must conform to the content standards of the communications rules, including the prohibition of misleading or inaccurate statements or claims. Finally, as stated in *Regulatory Notice 11-39*, a firm may not establish a link to any third-party site that the firm knows or has reason to know contains false or misleading content.

Native Advertising

Q6: Native advertising has been defined as content that bears a similarity to the news, feature articles, product reviews, entertainment and other material that surrounds it online. For example, native advertising may be a video or article posted by an advertiser on an independent third party publisher's site that is presented alongside, and in a manner similar to, content posted by the publisher. Is native advertising inherently misleading under FINRA's communications rules?

A: Firms may use native advertising that complies with the applicable provisions of FINRA Rule 2210, including the requirements that firms' communications be fair, balanced and not misleading. In particular, native advertising must prominently disclose the firm's name, reflect accurately any relationship between the firm and any other entity or individual who is also named, and reflect whether mentioned products or services are offered by the firm as required by Rule 2210(d)(3).[9]

Q7: May firms arrange for comments or posts by an individual (an "influencer") that promote the firm's brand, products or services?

A: Where a firm has arranged for a comment or post to be made, FINRA would regard the firm as entangled with the resulting communication. For example, Regulatory Notice 08-27 states, "If a firm or representative has paid for the publication, production or distribution of any communication that appears to be a magazine, article or interview, then the communication must be clearly identified as an advertisement. FINRA regards this information as material to ensuring that such communications are not misleading." Consistent with this guidance and the prohibition of misleading or false communications in Rule 2210, firms should clearly identify as advertisements any communications that take the form of comments or posts by influencers and include the broker-dealer's name as well as any other information required for compliance with Rule 2210.

Testimonials and Endorsements

Q8: Social networking websites may allow individuals who have connected to another user on the network to give an opinion of, or provide comments regarding, the user's professional capabilities. If the user is a registered representative who has established a business-related site on the social network that is supervised and retained by the broker-dealer, are these opinions or comments considered testimonials for purposes of FINRA's communications rule?

A: FINRA does not regard unsolicited third-party opinions or comments posted on a social network to be communications of the broker-dealer or the representative for purposes of Rule 2210, including the requirements related to testimonials in paragraph (d)(6).

Rule 2210(d)(6), Testimonials, states that:

> (A) If any testimonial in a communication concerns a technical aspect of investing, the person making the testimonial must have the knowledge and experience to form a valid opinion.
>
> (B) Retail communications or correspondence providing any testimonial concerning the investment advice or investment performance of a member or its products must prominently disclose the following:
>
> > (i) The fact that the testimonial may not be representative of the experience of other customers.
> >
> > (ii) The fact that the testimonial is no guarantee of future performance or success.
> >
> > (iii) If more than $100 in value is paid for the testimonial, the fact that it is a paid testimonial.

Q9: A third party may post unsolicited favorable comments about a registered representative on the representative's business-use social media website. The representative may then like or share the comments. Under these circumstances, are the third-party comments deemed to be a communication of the representative and, therefore, subject to FINRA's communications rules?

A: By liking or sharing the favorable comments, the representative has adopted them and they are subject to the communications rules, including the prohibition on misleading or incomplete statements or claims, the testimonial requirements noted above, and the supervision and recordkeeping rules.[10]

Q10: How may a registered representative or firm include the disclosures required for a testimonial in an interactive electronic communication?

A: The disclosures may be provided in the interactive electronic communication itself in close proximity to the testimonial or the disclosures may be made through a clearly marked hyperlink accompanying the testimonial using language such as **"important testimonial information,"** provided of course that the testimonial is not false, misleading, exaggerated or promissory.

Firms registered under the Investment Advisers Act of 1940 (Advisers Act) should be aware that Section 206(4) generally prohibits any investment adviser from engaging in any act, practice or course of business that the Commission, by rule, defines as fraudulent, deceptive or manipulative. In particular, Advisers Act Rule 206(4)-1(a)(1) states that "[i]t shall constitute a fraudulent, deceptive, or manipulative act, practice, or course of business . . . for any investment adviser registered or required to be registered under [the Advisers Act], directly or indirectly, to publish, circulate, or distribute any advertisement which refers, directly or indirectly, to any testimonial of any kind concerning the investment adviser or concerning any advice, analysis, report or other service rendered by such investment adviser."

Correction of Third-party Content

Q11: Suppose that an unaffiliated third-party publisher posts an online directory of businesses and includes information about registered representatives of a broker-dealer. Neither the firm nor the registered representatives requested, solicited or paid for the posting of these listings. If the firm or representative contacts the publisher to alert it to a factual error (*e.g.*, a misspelled name; incorrect street, website or email address; incorrect phone numbers), would the corrected listings be considered a communication of the firm or the representative?

A: When the correction pertains to factual information related to the directory listing alone, the fact that the firm or representative contacted the publisher would not mean that the corrected listing is a communication of the firm or the representative. Firms also may correct the error by posting a comment on the listing that includes the correct information without being deemed to have adopted the original, incorrect listing.

BrokerCheck

Q12: As announced in *Regulatory Notice 15-50*, effective June 6, 2016, FINRA amended Rule 2210 to require each of a firm's websites to include a readily apparent reference and hyperlink to BrokerCheck on (1) the initial web page that the firm intends to be viewed by retail investors, and (2) any other web page that includes a professional profile of one or more registered persons who conduct business with retail investors. To assist firms in complying with this new requirement, FINRA developed *BrokerCheck-related icons and similar resources*. *Regulatory Notice 15-50* states that a firm need not include a readily apparent reference and hyperlink to BrokerCheck from communications appearing on a third-party website including social media sites or in email or text messages. Does the requirement to include a readily apparent reference and hyperlink to BrokerCheck apply to an app created by a firm?

A: No. Because Rule 2210(d)(8) specifically references websites, there is no requirement to include a reference and hyperlink to BrokerCheck in an app. However, if an app accesses and displays a webpage on the firm's website that is required to include the BrokerCheck link under the rule, the firm must ensure that the link is readily apparent when the page is displayed through the app.

Endnotes

1. Rule 2210(b)(1)(D) excepts from the prior-to-use principal approval requirement of Rule 2210(b)(1)(A) retail communications posted on an online interactive electronic forum that the firm supervises and reviews in the same manner as correspondence as set forth in Rule 3110(b) and 3110.06 through .09. Rule 2210(c)(7)(M) excludes from filing with FINRA's Advertising Regulation Department any retail communication that is posted on an online interactive electronic forum. FINRA provided additional guidance regarding these exceptions in a question and answer published in *Regulatory Notice 15-17*.

2. *See* Andrew Perrin, Pew Research Center, Internet Science & Tech, *Social Media Usage: 2005-2015* (October 8, 2015).

3. In its *Native Advertising: A Guide for Business*, the Federal Trade Commission (FTC) describes native advertising as "content that bears a similarity to the news, feature articles, product reviews, entertainment, and other material that surrounds it online."

4. *See* *Business Insider, "Native ads will drive 74% of all ad revenue by 2021,"* (June 14, 2016) and *The Huffington Post, "2016 Native Advertising Trends For Publishers"* (June 21, 2016).

5. *See* Aaron Smith, Pew Research Center, Internet, Science & Tech, *U.S. Smartphone Use in 2015* (April 1, 2015).

6. SEA Rule 17a-4(b) requires broker-dealers to preserve certain records for a period of not less than three years, the first two in an easily accessible place. Among these records, pursuant to SEA Rule 17a-4(b)(4), are "[o]riginals of all communications received and copies of all communications sent (and any approvals thereof) by the member, broker or dealer (including inter-office memoranda and communications) relating to its business as such, including all communications which are subject to rules of a self-regulatory organization of which the member, broker or dealer is a member regarding communications with the public." *See also* FINRA Rule 2210(b)(4)(A) (requiring retention of communications with the public) and FINRA Rule 4511 (requiring members to make and preserve books and records).

7. The SEC first articulated these approaches as a basis for a company's responsibility for third-party information that is hyperlinked to its website. 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); Use of Electronic Media, SEC Rel. No. 33-7856 (April 28, 2000), 65 Fed. Reg. 25843, 25848-25849 (May 4, 2000). FINRA applies a similar analysis to third-party posts on social media or other websites established by the firm or its personnel. *See also* IM Guidance Update No. 2014-04, Guidance on the Testimonial Rule and Social Media (March 2014) for more information.

8. *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)*; and SEC Office of Compliance Inspections and Examinations National Examination Risk Alert, Investment Adviser Use of Social Media, (January 4, 2012) .

9. *See also*, the guidance provided in the FTC's Enforcement Policy Statement on Deceptively Formatted Advertisements, December 22, 2015.

10. In *Regulatory Notice 11-39*, FINRA stated: "The fact that the firm has a policy of routinely blocking or deleting certain types of content in order to ensure the content is appropriate would not mean that the firm had adopted the content of the posts left on the site. For example, most firms using social media sites block or screen offensive material. Such a policy would not indicate that the firm has adopted the remaining third-party content."

Social Media Influencers, Customer Acquisition, and Related Information Protection

September 2021

FINRA is conducting a review of firm practices related to the acquisition of customers through social media channels and how firms manage their obligations related to information collected from those customers and other individuals that may provide data to firms. Please note that each item requested is specific to the subsection header.

Unless otherwise noted, the relevant period for each request is January 1, 2020 through [*Date*, 2021] (the "Relevant Period"). In addition, if your response varies over the Relevant Period, please explain the differences in your response.

Definitions:

"Social Media" means any website or application that enables users to create and share content or participate in social networking. It includes, but is not limited to, TikTok, Facebook, Instagram, YouTube, Twitter, StockTwits, Reddit, and Twitch.

"Social Media Communications" means any communication with the public, including the provision of any content or advertisement about or on behalf of the firm, made pursuant to an arrangement with a third party, through Social Media.

"Referral Program" means any customer or account referral program offered or used by the firm through which individuals receive bonuses, rewards, incentives, or other compensation for referring new customers to open accounts at the firm.

"Social Media Influencers" or "Influencers" means any third party with whom the firm contracts or compensates to provide Social Media Communications.

"Nonpublic Personal Information (NPI)" is defined as that term is defined in 17 CFR § 248.3.

"Cookie" means any data generated by a website or mobile application about a user and then saved.

Social Media Influencers

1. Describe whether the firm, or its affiliate(s) on its behalf, finds and/or contracts with individuals or entities to provide Social Media Communications. If the firm engaged in such activity:

    a. Describe how the firm finds and/or contracts with individuals or entities to provide Social Media Communications, including whether and how the firm uses third parties, vendors, or services to find, contract, and/or compensate individuals or entities for Social Media Communications.

    b. Provide any engagement letters, contracts, agreements, or any other written, or offered arrangements in which the firm (or any affiliate of the firm) contracted to compensate individuals or entities to provide Social Media Communications. Please include any amendments to those engagement letters, contracts, agreements, or written arrangements.

    c. Describe and identify any individuals or entities with which the firm (or any affiliate of the firm) maintains any non-written agreements, or offers, to compensate individuals or entities to provide Social Media Communications.

    d. For the Relevant period, provide all Social Media Communications about the firm distributed or made available by individuals or entities identified above. A complete response to this request will include: (1) any Social Media Communications posted by the firm on the Influencer's social media account(s) and (2) any Social Media Communications the Influencer posted on any social media platform about the firm.

    e. Provide a numbered tabular list identifying each Social Media Communication provided pursuant to Item 1(d) above. Please also include the date the Social Media Communication was first made available to the public and whether or not the Social Media Communication was filed with FINRA's Advertising Regulation Department. If the Social Media Communication was filed, include the FINRA Advertising Regulation reference number for the communication.

f. State whether each Social Media Communication provided pursuant to Item 1(d) above was approved by a registered principal of the firm. If so, provide records that reflect such approvals.

2. Describe the criteria the firm uses to identify potential Influencers to recruit as well as any background information or other characteristics, if any, the firm considers when avoiding the use of particular Influencers.

3. Provide copies of any firm social media postings, website content, emails or other communications designed to recruit individuals to post Social Media Communications regarding or on behalf of the firm.

Referral Programs:

4. Describe whether the firm, or its affiliate(s) on its behalf, offered Referral Programs) during the Relevant Period. If the firm engaged in such activity, describe:

   a. The time period during which the Referral Program was or is in effect;

   b. The terms of the Referral Program;

   c. Eligibility requirements;

   d. Any restrictions concerning the Referral Program;

   e. Compensation, benefits, or bonuses offered through the Referral Program and the methodology for determination;

5. Provide copies of any firm social media postings, website content, emails, or other communications designed to recruit individuals, including Firm customers, to participate in any Referral Program identified in response to Request 4 above.

General Information related to Social Media Influencers and Referral Programs:

If the firm answered affirmatively to Request nos. (1) or (4):

6. Provide all versions of the firm's written supervisory procedures that were in effect at any time during the Relevant Period relating to:

   a. Social media communications by outside parties relating to the firm, including the method by which the firm supervises such activity;

   b. Use of marketing affiliates or relationships to refer new customers to the firm; and

   c. Referral Programs.

7. Provide any compliance policies, manuals, training materials, compliance bulletins, and any other written guidance in effect for any portion of the Relevant Period concerning Social Media Communications, use of marketing affiliates, and Referral Programs.

8. Describe how the firm maintains records of Social Media Communications created by Influencers as well as Social Media Communications made by the individuals or entities participating in its Referral Programs.

9. State whether the firm required Influencers, or the individuals or entities participating in its Referral Programs -- to attend trainings and/or educational courses prior to providing Social Media Communications in connection with the firm. If the answer is in the affirmative, provide a detailed explanation of the firm's requirements, the training and/or educational courses required, and the firm's method for tracking completion by Influencers and participants in the Referral Programs. Please identify which training and/or educational courses were for Influencers and which were for the Referral Program.

10. Provide copies of any policies, manuals, training materials, compliance bulletins, and any other written guidance provided to Influencers as well individuals or entities participating in the firm's Referral Program. Please identify which material was provided to Influencers and which was provided to Referral Program participants.

Items related to Regulation S-P and Usage Information:

11. Provide the firm's written supervisory procedures concerning its compliance with the SEC's Regulation S-P: Privacy of Consumer Financial Information and Safeguarding Personal Information (Regulation S-P). Include a description of the firm's supervisory system during the Relevant Period concerning compliance with Regulation S-P with regard to the collection of Cookies obtained from customers, or individuals who provide NPI but are not onboarded as customers.

12. Provide all versions of all initial privacy notices, *see* 17 CFR § 248.4, that the firm used at any time during the Relevant Period.

13. To the extent not provided in response to the prior request, provide all versions of all opt-out notices, *see* 17 CFR § 248.7, that the firm used at any time during the Relevant Period.

14. Provide all versions of all annual privacy notices, *see* 17 CFR § 248.5, that the firm used at any time during the Relevant Period.

15. Provide any desk top procedures, compliance policies, manuals, training materials, compliance bulletins, and any other written guidance in effect for any portion of the Relevant Period concerning the sharing of any customer NPI with any third party.

16. Provide any desk top procedures, compliance policies, manuals, training materials, compliance bulletins, and any other written guidance in effect for any portion of the Relevant Period concerning individuals' ability to opt-out of information sharing.

17. Describe all types of data the firm tracks (or has tracked at any time during the Relevant Period), through the use of a Cookie or otherwise, in connection with its customers' usage of (a) the firm's website and/or (b) the firm's mobile application (collectively "Usage Information"). Include individuals who provide NPI but are not onboarded as customers.

18. Provide a list of all non-affiliated third parties with which the firm or any affiliate of the firm shares (or has shared at any time during the Relevant Period) any Usage Information.[1] In addition, for each third party, provide the following information:

    a. A list of each type of Usage Information shared with that third party;

    b. Whether the data shared with the third party is anonymized;

    c. The firm's understanding of the third party's intended use of the Usage Information;

    d. How or to what extent the third party restricts access to Usage Information and describe the controls in place;

    e. The number of individuals whose Usage Information the firm or any affiliate of the firm shared with that third party during the Relevant Period;

    f. All written contracts or agreements between the firm (or, if applicable, the firm's affiliated entity) and the third party concerning any Usage Information in force at any time during the Relevant Period; and

    g. Any compensation or benefit (including but not limited to monetary payments, reductions of amounts otherwise due, reciprocal sharing of information, and/or other non-monetary benefit) received by the firm or any of the firm's affiliated entities in any way related to the sharing of any Usage Information with that third party.

19. Provide any disclosures the firm provided to customers during the Relevant Period concerning any Usage Information shared with non-affiliated third parties and whether individuals identified in response to item 18 consented to the sharing of Usage Information.

20. Provide any exception reports or any other memoranda that reflect instances during the Relevant Period in which the firm failed to comply with Regulation S-P as a result of its sharing of Usage Information with any non-affiliated third party. Provide copies of all documents concerning the firm's identification, investigation, and/or reporting of any such instances, or concerning the firm's consideration of whether to report the same.

---

1 Exclude from your response to this request any Usage Information shared with: any state, federal, or foreign regulator or other governmental entity; any self-regulatory organization; law enforcement; any clearing firm; any other financial institution pursuant to Section 314(b) of the USA PATRIOT Act; any party in response to a subpoena, court order, or discovery request; the customer or any other party as requested by the customer; or any other sharing mandated by law.