Regulatory Notice 17-18

April 2017

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:

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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*.

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).

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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."