

PUBLICATION

Use Of Social Media Web Sites By Broker Dealers

May 13, 2010

FINRA recently issued guidance in Regulatory Notice 10-06 to broker-dealers regarding the use of social media sites (e.g., Facebook, Twitter, LinkedIn) by firms and their registered representatives.

FINRA makes clear throughout the Notice that, if there are issues regarding a broker-dealer's compliance with FINRA rules relating to social media, a broker-dealer that has established formal written rules will be viewed more favorably than a firm that has no written rules. Below, we call attention to certain FINRA rules that are likely to be implicated by use of social media sites by broker-dealers and suggest actions that firms may want to consider in light of the recent FINRA guidance.

Communications with the Public

FINRA has specifically included unscripted participation in an "interactive electronic forum," such as a chat room, in its definition of "public appearance" contained in NASD Rule 2210 (Communications with the Public). Communications that are "advertisements" are subject to fairly stringent rules regarding content, and many must be approved or filed with FINRA prior to their use. According to the new guidance from FINRA, "static" online postings are considered to be advertisements and therefore may have to be pre-approved before their use and may be subject to the other restrictions on advertisements. Postings made in "real time," by contrast, are not advertisements but still fall under the category of "interactive electronic forum," and therefore are public appearances under NASD Rule 2210. **Member firms and registered representatives should consider the following action items:**

- Prohibit associated persons from making static postings on social media sites.
- Require approval of static postings by internal compliance officers before posting.
- Develop and implement a self-reporting system to assist in accountability of individuals in their selling activities.

Recordkeeping Responsibilities

Firms and representatives should be cautious when communicating through social media to ensure that records of those communications are retained as required in accordance with Rules 17a-3 and 17a-4 of the Securities Exchange Act of 1934 and NASD Rule 3110. **Member firms and registered representatives should consider the following action items:**

- Develop an automatic retention policy for interactive electronic communications.
- Implement a system that "flags" and retains those interactive electronic communications that contain certain key words as determined by the firm.

Determinations of Suitability

The suitability requirements (NASD Rule 2310) apply to recommendations made through electronic communications. Firms should be particularly cautious on this point, as many web sites make their content widely available, which could result in a much greater responsibility and undertaking by firms making the

suitability determination. **Member firms and registered representatives should consider the following action items:**

- Require pre-approval by a registered principal of the content of all interactive electronic communications that recommend a specific product.
- Develop a database of previously approved communications and require all interactive electronic communications to conform to the templates in the database.
- Develop procedures governing all communications that promote specific investment products, regardless of whether the communications would constitute a "recommendation."

Supervision Responsibilities

The FINRA rules require firms to establish and maintain systems to supervise the activities of their registered representatives in a way that is reasonably designed to ensure compliance with securities laws and regulations and FINRA rules. Due to the spontaneous nature of social media, firms may want to focus their supervision policies more on pre-approval of such communications rather than post-use review. **Member firms and registered representatives should consider the following action items:**

- Develop policies and procedures for the review of certain internal electronic communications by employees (e.g., research reports, customer complaints and account changes).
- Supervise specific social media sites and prohibit persons from engaging in business communications on a social media web site that is not supervised by the firm.
- Require training on the firm's policies and procedures regarding interactive electronic communications.
- Monitor compliance with internal policies regarding use of social media web sites and consider restricting or prohibiting usage for continual violators.

Third-Party Posts

Online posts by customers or other third parties are generally not treated by FINRA as being the firm's communication with the public subject to Rule 2210. Under certain circumstances, however, third-party posts may become attributable to firms, depending on whether the firm has involved itself in the preparation of the content or otherwise endorsed or approved the content. **Member firms and registered representatives should consider the following action items:**

- Post a disclaimer on the firm's web site distancing it from third-party posts and stating that third-party posts do not reflect the views of the firm.
- Monitor third-party posts in accordance with an established firm policy.
- Establish and publish usage guidelines for customers and other third parties that are permitted to post on firm-sponsored web sites.

For more information, please contact your Baker Donelson attorney.