

MEMO# 24119

February 2, 2010

FINRA Issues Guidance Regarding Use of Social Networking Websites

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TO: TRANSFER AGENT ADVISORY COMMITTEE No. 7-10 RE: FINRA ISSUES GUIDANCE REGARDING USE OF SOCIAL NETWORKING WEBSITES

The Financial Industry Regulatory Authority recently issued guidance to member firms regarding the use of social networking websites such as Facebook, Twitter, LinkedIn and blogs to communicate with the public. [\[1\]](#) The guidance is summarized below.

Recordkeeping Responsibilities

According to the Notice, firms are required to keep records of communications that are made through social media sites and that are related to the broker-dealer's business. It is up to each firm to determine whether any particular technology system provides the retention and retrieval functions necessary to comply with Securities and Exchange Commission and FINRA recordkeeping requirements. FINRA is not certain that adequate technology currently exists.

Suitability Responsibilities

According to the Notice, if a firm or its personnel recommends a security through a social media site, the suitability requirements of NASD Rule 2310 apply. In addition, interactive electronic communications on a social media site that recommend specific investment products often are required to include additional disclosure in order to provide a customer with a sound basis for evaluating the facts with respect to the product. Such communications also may trigger requirements under Rule 482 under the Securities Act of

1933. [2] For these reasons, firms are required to adopt policies and procedures reasonably designed to address communications that recommend specific investment products.

According to the Notice, as a best practice, firms should consider prohibiting all interactive communications that recommend specific investment products and any link to such a recommendation unless a registered principal has previously approved the content. Alternatively, firms might consider prohibiting these communications unless they conform to a pre-approved template and the specific recommendation has been approved by a registered principal. Firms should consider adopting policies and procedures with respect to communications that promote specific investment products, even if these communications might not constitute “recommendations” for purposes of the suitability rule.

Types of Interactive Electronic Forums

According to the Notice, FINRA considers static postings on a blog or social networking sites to constitute advertisements under NASD Rule 2210 subject to prior principal approval. If the blog or site is used to engage in real-time interactive communications that portion of the site would be an “interactive electronic forum” that would not be subject to prior principal approval but would be subject to supervision requirements, as discussed below.

Supervision of Social Media Sites

According to the Notice, firms are required to supervise interactive electronic forums under NASD Rule 3010 in a manner reasonably designed to ensure that they do not violate the content requirements of FINRA’s communications rules. [3] Consistent with Institute views, firms are permitted to 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. [4] Internal electronic communications that are of a particular subject matter, such as customer complaints, continue to require review by an employee’s supervisor.

According to the Notice, 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. It further states that 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.

Third Party Posts

Consistent with Institute views, according to the Notice, third party posts are not considered

to be the firm's communication with the public and therefore the prior principal approval, content, and filing requirements of NASD Rule 2210 do not apply. However, third party content might be attributable to the firm depending on whether the firm has involved itself in the preparation of the content or explicitly or implicitly endorsed or approved the content. [5] For example, FINRA would consider a third party post to be a firm's communication with the public if: prior to posting, the firm paid for, or was otherwise involved in the preparation of the content; or if after the content is posted, the firm endorses the post.

According to the Notice, many firms monitor third party posts for specific purposes and that some of the best practices adopted by members of FINRA's Social Networking Task Force include establishing usage guidelines, screening procedures and disclosing firm policies regarding responsibilities for third-party posts. [6]

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endnotes

[1] See Regulatory Notice 10-06 (January 2010) ("Notice"), which is available on FINRA's website at <http://www.investmentnews.com/assets/docs/CI68388125.PDF>.

[2] The Notice states that even if FINRA considers a communication made through an interactive electronic forum to be a public appearance, the SEC staff still could conclude that Rule 482 and the filing requirements under Section 24(b) of the Investment Company Act apply to the communication.

[3] See, e.g., Regulatory Notice 07-59 (permitting prior approval and post-use review, including sampling and lexicon-based search methodologies).

[4] See [Memorandum](#) to Advertising Compliance Advisory Committee No. 4-09, SEC Rules Members No 122-09, Closed-End Investment Company Members No 52-09, Internal Sales Managers Roundtable No. 12-09, Marketing Practices and Technology [23964], dated November 19, 2009 (summarizing the Institute's comment letter to FINRA on proposed amendments to FINRA's advertising rules).

[5] The Notice explains that the SEC has referred to these circumstances as the entanglement and adoption theories, respectively.

[6] FINRA organized this task force, composed of FINRA staff and industry representatives, in September 2009 to discuss how firms and their registered representatives could use social media sites for legitimate business purposes in a manner that ensures investor protection. Despite the Notice's use of the terminology "best practices," there are no formal set of best practices for reference purposes.

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