

FINRA releases guidance on social media and digital communications

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Abstract

Purpose – To summarize recent FINRA guidance on social media and digital communications published in Regulatory Notice 17-18.

Design/methodology/approach – The intention was to provide a brief summary of the recent FINRA guidance on social media and digital communications published in Regulatory Notice 17-18 along with previous guidance in Regulatory Notices 10-06 and 11-39.

Findings – The new guidance focuses on a number of areas of digital communications including text messaging, personal communications, hyperlinks and sharing, native advertising, testimonials and endorsements, correction of third-party content and BrokerCheck links.

Practical implications – Firms should review this new guidance alongside existing FINRA guidance and their current social media and digital communications practices. Where firms observe deficiencies in their existing practices, adjustments should be made before they find themselves the subject of a FINRA investigation, examination or enforcement action.

Originality/value – Practical explanation by experienced financial services lawyers.

Keywords Financial Industry Regulatory Authority (FINRA), Social media, Digital communications, Rule 2210

Paper type Technical paper

The Financial Industry Regulatory Authority, Inc. (“FINRA”) released additional guidance on social media and digital communications in Regulatory Notice 17-18 (www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-17-18.pdf). The guidance focuses on several areas of digital communications including text messaging, personal communications, hyperlinks and sharing, native advertising, testimonials and endorsements, correction of third-party content and BrokerCheck links. The new guidance from FINRA is summarized below.

Background

FINRA previously issued guidance on the use of social media communications in Regulatory Notice 10-06 (www.finra.org/sites/default/files/NoticeDocument/p120779.pdf) and Regulatory Notice 11-39 (www.finra.org/sites/default/files/NoticeDocument/p124186.pdf). FINRA codified the guidance in these past Regulatory Notices in FINRA Rule 2210. FINRA also previously published the *Retrospective Rule Review Report: Communications with the Public* (www.finra.org/sites/default/files/p602011.pdf), which in part recommended that FINRA consider more guidance in light of emerging technologies and communications innovation. In response to that report, FINRA published Regulatory Notice 17-18 to provide further guidance in this area.

FINRA noted that the guidance is not intended to alter the principles or guidance provided in prior FINRA regulatory notices and provides guidance only with respect to FINRA rules and not the rules of the Securities and Exchange Commission (“SEC”) or any other federal

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or state agency. However, the SEC has previously released its own guidance on the use of social media communications focused on investment advisers (www.sec.gov/about/offices/ocie/riskalert-socialmedia.pdf and www.sec.gov/investment/im-guidance-2014-04.pdf). The SEC also released a rule last year that amended Form ADV to require social media disclosures (www.sec.gov/rules/final/2016/ia-4509.pdf).

Business versus personal communications and recordkeeping

Rule 17a-4(b) under the Securities Exchange Act of 1934 requires firms to retain records of communications that relate to their “business as such”. Regulatory Notice 11-39 noted that determining whether a communication must be retained depends on its content and not upon the device or technology used. In its new guidance FINRA states that firms that communicate, or allow its associated persons to communicate, with regard to its business through a text messaging app or chat service must retain records of those communications. Similarly, whether a communication by an associated person is subject to FINRA Rule 2210 depends on whether the content relates to products or services of the firm. FINRA’s new guidance also notes that if an associated person in a personal communication shares or links to content the firm makes available in its communications that does not concern the firm’s products or services, such as an employment opportunity or information on a charitable event, the communication is generally not subject to FINRA Rule 2210.

Hyperlinks and sharing: adoption and entanglement with content

Regulatory Notice 11-39 stated 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 that firms are responsible under the communications rules for content on a linked third-party site if the firm has adopted or become entangled with its contents. In its new guidance FINRA notes that when firms share or link to specific content, such as an article or video posted by an independent third party, it has adopted that content. Thus, firms should ensure that, when read with the statements in the originating post, the content complies with the same standards as communications created by the firm.

FINRA’s new guidance indicates that if a firm shares or links content that links to other content or articles, the firm has not generally adopted that other content. However, a firm has adopted that other content if, based on the facts and circumstances, it has influence or control over that other content. Further, if 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, then the firm has adopted that other content.

If a firm’s website includes a link to a section of an independent third-party website, FINRA’s view is that the firm has not adopted the content of that third-party website if the firm does not have any influence or control over the content of the third-party site and if the link is ongoing. The link is ongoing if it 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 investors can use the link even if the linked site is updated or changed by the independent third party.

Correction of third-party content

FINRA’s new guidance provides that where an unaffiliated third party publishes an online directory and includes information about registered representatives of a broker-dealer that was not requested, solicited or paid for by the firm or the registered representative, the firm or representative can contact the publisher to correct factual information related to the directory listing (e.g., a misspelled name, incorrect contact information, etc.) without the corrected listing being considered a communication of the

firm or representative. Firms may also post a comment on the listing that includes the correct information without being deemed to have adopted the original incorrect listing.

Native advertising

Native advertising is advertising content that bears a similarity to the other (non-advertising) material that surrounds it online. In its new guidance FINRA notes that firms may use native advertising as long as it complies with the requirements of FINRA Rule 2210, including that the firm's communications are fair, balanced and not misleading. Further, native advertising must prominently disclose the firm's name, accurately reflect 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.

If a firm has paid or otherwise arranged for a comment or post to be made by an individual (an "influencer"), the firm is entangled with the resulting communication. Thus, 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 under FINRA Rule 2210.

Testimonials and endorsements

Regulatory Notice 10-06 provided that posts by customers or other third parties on social media or other websites established by a firm or its personnel generally do not constitute communications with the public under FINRA Rule 2210. Thus, FINRA notes in its new guidance that unsolicited third-party opinions or comments posted on a social network are not regarded as communications of the broker-dealer or the representative for purposes of FINRA Rule 2210. However, FINRA also notes that by liking or sharing comments on the representative's business-use social media website, the representative has adopted those comments and they are subject to the communications rules, including the prohibition on misleading or incomplete statements or claims, the testimonial requirements, and the supervision and recordkeeping rules. FINRA's new guidance also notes that if testimonial disclosures are required in connection with an interactive electronic communication, they may be provided in the communication itself in close proximity to the testimonial or may be made through a clearly marked hyperlink accompanying the testimonial information such as "important testimonial information", provided that the testimonial is not false, misleading, exaggerated or promissory.

FINRA highlights that firms that are also registered under the Investment Advisers Act of 1940 should be aware that Advisers Act Rule 206(4)-1(a)(1) states that it shall constitute a fraudulent, deceptive, or manipulative act for any registered investment adviser 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 services rendered by such investment adviser.

BrokerCheck

FINRA Rule 2210 was amended to require certain webpages on each of a firm's websites to include a readily apparent reference and hyperlink to BrokerCheck. FINRA's new guidance provides that because the rule specifically references websites, there is no requirement to include a reference and hyperlink to BrokerCheck in an app created by the firm. However, if an app accesses and displays a webpage on the firm's website that is required to include the BrokerCheck link, the firm must ensure the link is readily apparent when the page is displayed through the app.

What's next?

In light of the new FINRA guidance, firms should review their use of social media sites and other digital communications carefully to determine whether they are in compliance with the FINRA communications rules. Firms that determine their communications are not meeting these rules and guidance should move quickly to address those issues.

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