



SECURITIES INDUSTRY PRACTICE

ALERT

FINRA'S GUIDANCE ON SOCIAL MEDIA WEB SITES

Facebook, Twitter and personal blogs have become staples of American life over the past five years. Studies show that businesses have also increasingly turned to these social media outlets to communicate with customers, advertise and conduct business.

Social media outlets have not escaped the notice of FINRA. FINRA previously promulgated Rule 2210 to regulate electronic communications in the form of Internet chat rooms. Specifically, Rule 2210 does not require a registered principal to approve in advance the extemporaneous communications of personnel who are engaging in this practice. However, it does provide supervisory and content requirements for interactive electronic forums. Nonetheless, as broker-dealers venture into social media, FINRA recently issued *Regulatory Notice 10-06* as guidance to firms on applying the communication rules to social media sites.

Supervision of Interactive Electronic Media

Firms should be aware that the treatment of communications on social media sites under Rule 2210 depends on whether the communications are static content or interactive content. Static content is treated as "advertisements," and if the firm or registered representative sponsors a social media site, the associated person or broker-dealer must obtain approval from the registered principal prior to any posting. On the other hand, if the social media site is used for real-time interactive communications, FINRA would consider the posting to be an interactive communication that does not require prior approval of the registered principal.

Under Rule 3010, firms are required to supervise interactive electronic communications in a manner

reasonably designed to ensure that the communications do not violate the content requirements of FINRA's communication rules. Firms may adopt supervisory procedures similar to those outlined in *Regulatory Notice 07-59* (FINRA Guidance Regarding Review and Supervision of Electronic Communications). FINRA recommends that firms consider supervising interactive electronic communication by the following methods:

1. A lexicon based review where the firm randomly searches sensitive words or phrases that could signal a problematic communication;
2. A random review of electronic correspondence where the firm chooses a reasonable percentage of posts and reviews the content; or
3. A combination of a lexicon based review and random review.

FINRA also recommends that firms adopt policies and procedures reasonably designed to ensure that their associated persons and broker-dealers, who participate in social media sites for business purposes, are properly supervised. In particular, firms should have a general policy prohibiting any associated person from engaging in business communications without the firm's supervision. Firms must also provide adequate training for their associated persons regarding interactive electronic communications.

Importantly, FINRA does not treat posts by customers or other third parties as the firm's communications. Under certain circumstances, however, third-party posts may be attributable to the firm where the firm is: (1) involved in the preparation of the content; or (2) explicitly or implicitly endorses or approves the

content. Firms are responsible for monitoring third-party posts to the extent that the communications can become attributable to the firm.

Recordkeeping Responsibilities

FINRA requires that firms retain records of communications related to the broker-dealer's business that are made through social media sites. Although FINRA is aware that certain technology providers are developing systems that allow firms to retain such records, FINRA does not endorse a particular method or manner of recordkeeping.

Suitability Responsibilities

If a firm or its personnel recommend a security through a social media site, the particular communication will be considered a "recommendation" under NASD Rule 2310. Since social media sites allow the content to be viewable by all or some of the public, Rule 2310 requires a broker-dealer to first make a determination that the recommendation is suitable for every investor to whom it is made. As such, communications through social media sites may trigger suitability rules, substantive liability for the firm or registered

representative and other requirements under the federal securities laws and FINRA Rules.

FINRA recommends that firms prohibit all interactive electronic communications that recommend a specific investment unless the registered principal has approved the content. If the firm does allow specific investment recommendations through social media sites, FINRA recommends that firms maintain databases of pre-approved communications that personnel may access as templates. At the very least, firms must adopt policies and procedures reasonably designed to address communications that recommend specific investments through social media sites.

Conclusion

While electronic media continues to expand the manner and method in which firms can reach potential customers, each firm must continue to comply with federal law and regulatory policy developed through FINRA. Fox Rothschild attorneys are here to assist firms in developing their own policies and procedures that are best suited to ensure the firm complies with all applicable requirements.

If you have any questions regarding the information in this alert, please contact:

Ernest E. Badway at 973.548.7530 or 212.878.7900; ebadway@foxrothschild.com

Joshua Horn at 215.299.2184; jhorn@foxrothschild.com

Joseph M. Pastore III at 203.425.1504; jpastore@foxrothschild.com

Amit Shah at 215.299.3834; ashah@foxrothschild.com

or any other member of our [Securities Industry Practice Group](#).

Visit us on the web at www.foxrothschild.com.



Fox Rothschild LLP
ATTORNEYS AT LAW

Attorney Advertisement

© 2010 Fox Rothschild LLP. All rights reserved. This publication is intended for general information purposes only. It does not constitute legal advice. The reader should consult with knowledgeable legal counsel to determine how applicable laws apply to specific facts and situations. This publication is based on the most current information at the time it was written. Since it is possible that the laws or other circumstances may have changed since publication, please call us to discuss any action you may be considering as a result of reading this publication.