



## **Legal Update: B/D Regulatory & Compliance**

February 22, 2010

### **Blogs, Social Media Networking Sites, and Supervision**

As a result of the increased use of social media websites, such as blogs or social networking sites for business and personal communications, the Financial Industry Regulatory Authority (FINRA) issued Regulatory Notice 10-06 (the "Notice") for guidance on how FINRA rules governing communications with the public apply to social media sites sponsored by a firm or its registered representatives. Ultimately, the use of social media sites such as Twitter®, Facebook® and LinkedIn® for business purposes are covered by NASD Rule 2210 as they are deemed to be Communications with the Public.

The type of communication defined by Rule 2210 is determined by the nature of the communication as either being interactive or static. Static content includes content such as a profile, background or wall information. Static content on a social media site is considered advertising as it is available to visitors to the site, and as such, must be approved by a principal prior to use. However, advanced approval is not required to the extent that a pre-approved template is being utilized by the firm with respect to the content.

Interactive content includes electronic forum communications, such as a blog (to the extent that the blog contains discussions between multiple parties) or a social media networking site, which is treated similar to a public appearance. To complicate the oversight and supervision of social networking websites, FINRA believes that while it does not require pre-approval by a principal, the activities still must be supervised by the firm. Therefore, just as firms are required to supervise incoming, outgoing and internal communication, they may utilize a risk-based model in a similar manner regarding supervision of other forms of electronic correspondence.

As with general sales activities which include recommendations of specific securities, firms and representatives were cautioned that when making recommendations on social media sites,

those recommendations must be suitable for every investor to whom the recommendation is made. Thus, as a best practice, FINRA believes that firms should prohibit the use of interactive media for recommending a specific securities product, unless the recommendation has been pre-approved by a principal.

FINRA also represented that in implementing a supervisory program to monitor, review and supervise the utilization of interactive sites, firms must be able to document that they have adequate technology to monitor the activities on such sites and document evidence of review of the communications prior to permitting use of interactive sites. Firms are also required to meet the record retention requirements of SEC Rule 17a-3 and 17a-4. Additionally, the importance of training was discussed, as the Notice represented that prior to permitting associated persons to utilize social media sites for business purposes, firms must ensure that the personnel have been appropriately trained regarding the policies and procedures pertaining to the use of those forms of communication.

Ironically, the impact of the Notice goes beyond those firms who embrace the utilization of social media networking sites. Based on the current use of social media networking by businesses, it may prudent for firms to expand their procedures to allow for back testing the fact that their registered representatives do not or have not utilized social media websites such as Twitter®, Facebook® or LinkedIn®.

With this said, it is clear that firms should give thoughtful attention to their policies and procedures, as they must be reasonably designed to address the supervision of the firm and registered persons utilizing social media networking sites for business purposes. While the procedures need to address communications that recommend specific investment products, they must be designed to address the other issues discussed herein and ensure that interactive electronic communications do not violate FINRA or SEC rules.

We hope you have found this information helpful. Should you have any additional questions or concerns, please feel free to contact Daniel E. LeGaye or Michael Schaps directly at 281-367-2454, or via email at [info@legayelaw.com](mailto:info@legayelaw.com) or consult with your legal counsel or applicable third party consultant.

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