

FINRA Provides Guidance On Applying Communications Rules to Social Media Websites

In January 2010, the Financial Industry Regulatory Authority (FINRA) issued Regulatory Notice 10-06 in recognition that “Americans are increasingly using social media Web sites, such as blogs and social networking sites, for business and personal communications,” and provided guidance to firms regarding “how the FINRA rules governing communications with the public apply to social media sites that are sponsored by a firm or its registered representatives.”¹ While the Notice was issued several months ago, its guidance is proving to be of great interest in light of the rapidly increasing use of social media websites for business purposes.

FINRA issued Notice 10-06 after receiving input from a Social Networking Task Force it organized, composed of FINRA staff and industry representatives, “to discuss how firms and their registered representatives could use social media sites for legitimate business purposes in a manner that ensures investor protection.”² According to FINRA, the goal of the Notice “is to ensure that -- as the use of social media sites increases over time -- investors are protected from false or misleading claims and representations, and firms are able to effectively and appropriately supervise their associated persons’ participation in these sites. At the same time, FINRA is seeking to interpret its rules in a flexible manner to allow firms to communicate with clients and investors using this new technology.”³ FINRA notes, however, that each firm must establish procedures designed to ensure compliance with the requirements and should consider the Notice’s guidance in the particular context of its own business and its compliance and supervisory programs.

The following are highlights of the Notice’s guidance:

- Firms are required to keep records -- as required by Rules 17a-3 and 17a-4 under the Securities Exchange Act of 1934 and NASD Rule 3110 -- of communications related to the broker-dealer’s business that are made via social media websites.
- If a particular communication on a social media site constitutes a “recommendation” of a security for purposes of Rule 2310 (a matter dependent on the specific facts and circumstances surrounding the communication), the requirements of NASD Rule 2310 regarding suitability will be triggered.
- Blogs consisting of static postings, as well as static content on social networking sites such as Facebook, Twitter and LinkedIn, are considered “advertisements” under Rule 2210; thus, a firm or its registered representative that sponsors such a blog or establishes a page on a social networking site must obtain the approval of a registered principal prior to any posting. On the other hand, blogs enabling users to engage in real-time interactive communications and those portions of social networking sites providing for such interactive communications are considered an “interactive electronic forum,” which does not require prior principal approval. However, firms must supervise such communications “under NASD Rule 3010 in a manner reasonably

¹ See Regulatory Notice 10-06, Social Media Web Sites: Guidance on Blogs and Social Networking Web Sites (January 2010), available at <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p120779.pdf>, at 1.

² *Id.* at 2.

³ *Id.*

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designed to ensure that they do not violate the content requirements of FINRA’s communications rules.”⁴

- “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.”⁵
- Except for certain situations in which the firm or its personnel has either become entangled with the preparation of a posting by a third party or has adopted its content, posts by customers or other third parties are not deemed to be the firm’s communication with the public pursuant to Rule 2210. As a result, the prior principal approval and content and filing requirements of Rule 2210 are inapplicable to such posts.

For more detailed information regarding FINRA’s guidance on the applicability of FINRA’s rules to communications occurring on social media websites, please refer to Notice 10-06, which contains a user-friendly Q&A on the subject.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com; or Yafit Cohn at 212.701.3089 or ycohn@cahill.com.

⁴ *Id.* at 6.

⁵ *Id.* at 7.