SOCIAL MEDIA UPDATE: FINRA RELEASES ADDITIONAL GUIDANCE ON SOCIAL NETWORKING WEBSITES AND BUSINESS COMMUNICATIONS

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Investment Management, Hedge Funds and Alternative Investments Alert

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On April 25, 2017, the Financial Industry Regulatory Authority, Inc. ("FINRA") released a Regulatory Notice titled *Social Media and Digital Communications: Guidance on Social Networking Websites and Business Communications*[1] (the "Notice") that is intended to provide further guidance regarding the application of the FINRA rules governing communications with the public to FINRA member firms' use of social media sites.

In discussing its reasons for issuing the Notice, FINRA notes that in connection with its retrospective review of the communications rules,[2] industry participants had suggested additional guidance was necessary with respect to the application of the communications rules to social media sites. Moreover, FINRA also comments on the general increased use among adults of social media sites and the frequency of social media and other sites to facilitate the use of native advertising,[3] which has resulted in member firms increasingly raising questions regarding the application of FINRA rules to the use of social media and other forms of digital communications.

The Notice summarizes previously existing FINRA guidance related to member firms' social media usage in the following areas:

- **Recordkeeping**: Regulatory Notices 10-06[4] and 11-39[5] reminded member firms of their obligation to retain records of digital communications that relate to their "business as such" under Rule 17a-4(b)(4) under the Securities Exchange Act of 1934. Regulatory Notice 11-39 also stated that member firms have an obligation to train and educate their associated persons regarding the differences between business and non business communications and the measures required to retain, retrieve, and supervise business communications.

- **Third-party posts**: Regulatory Notice 10-06 stated that, generally, posts by customers or other third parties on social media sites established by the member firm or its personnel do not constitute communications with the public by the firm under FINRA Rule 2210.[6] There are some exceptions to this general rule, such as when the firm has paid for or been involved in the preparation of the content (i.e., entanglement) or when the firm explicitly or implicitly endorses the content (i.e., adoption).

- **Hyperlinks to third-party sites**: Regulatory Notice 11-39 stated that a member 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 may not include a link on its website if there are any red flags that the linked site contains false or misleading content. Regulatory Notice 11-39 also cautioned member firms regarding the potential to become responsible under the rules if they adopt or become entangled with third-party content.

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In a question and answer format, the Notice then provides guidance on a number of topics. We have summarized the guidance on certain topics below:

- **Testimonials and Endorsements:** The Notice states that unsolicited third-party opinions or comments posted on a social media website are not communications of the member firm, nor are they testimonials for purposes of FINRA Rule 2210. However, if the associated person or the member firm likes or shares the favorable comments, they will be considered to have adopted the comments and the comments will become subject to the communications rules, including the requirements related to testimonials, prohibition on misleading or incomplete statements, and the supervision and recordkeeping rules. It also states that when including the required testimonial disclosures in an interactive electronic communication, member firms should include the disclosures in close proximity to the testimonial or clearly marked with language indicating it is a testimonial, such as "important testimonial information."
- **Personal Communications:** The Notice clarifies that if an associated person shares or links to member firm content in a personal communication, that communication is only subject to FINRA Rule 2210 when the content relates to the products or services of the firm. For example, an associated person's post regarding the member firm's sponsorship of a charitable event, a human interest article, or an employment opportunity would not be subject to FINRA Rule 2210. The Notice does not expressly define "personal communication" (other than noting the communication "does not concern the firm's products or services"). Member firms may want to consider reviewing their policies and procedures to determine whether they provide definition as to what constitutes a personal communication and what constitutes a business communication, and educate employees about the distinction. Similarly, where employees are not permitted to use personal social media accounts for business communications, member firms may want to make sure policies and procedures regarding this are clear and provide appropriate employee education.
- **Hyperlinks and Sharing:** The Notice clarifies the FINRA staff's views with respect to adoption of third-party content, by stating that a member firm "adopts" third-party content when it shares or links to such content and it is therefore responsible for ensuring that, when read in context with the statements in the originating post, the shared content complies with the communications rules. If the shared or linked content contains links to other content, the circumstances of the particular links determine whether the firm will be deemed to have adopted or become entangled with the additional linked content. In general, the Notice states that adoption of content turns on whether the firm has influence or control over the additional content or if the original third-party content simply takes a user to a page that "serves primarily as a vehicle for links," in which case the firm's adoption would extend to the links. When the link is to a section of a third-party website, the analysis becomes two-fold: (1) whether the link is "ongoing"[7] and (2) whether the firm has influence or control over the content of the third-party website.
- **Text Messaging:** The Notice clarifies that every member firm that communicates, or allows its associated persons to communicate, regarding its business through a text messaging app or chat service must retain records of those communications (depending on the content of the message) pursuant to Securities and Exchange Commission and FINRA rules.

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The Notice also clarifies that a member firm may use native advertising under certain conditions as long as it complies with FINRA Rule 2210. It also provides guidance regarding correcting third-party content without adopting the content and the requirements for BrokerCheck references and links when using social media.

In conclusion, the Notice highlights FINRA's interest in addressing industry concerns related to the increased use of social media sites and other digital communications by its member firms. We note, however, that uncertainties remain and we hope to see additional guidance on this topic in the future. FINRA member firms should consider reviewing their policies and procedures in light of the guidance contained in the Notice.

Notes:

[1] FINRA, Regulatory Notice 17-18, Social Media and Digital Communications: Guidance on Social Networking Websites and Business Communications (April 2017), http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-17-18.pdf.

[2] FINRA, Retrospective Rule Review Report (December 2014), https://www.finra.org/file/retrospective-rule-review-report-communications-public.

[3] The Notice defines “native advertising” as advertising content that matches the form and function of the platform on which it appears.

[4] FINRA Regulatory Notice 10-06, Social Media Web Sites: Guidance on Blogs and Social Networking Web Sites (January 2006), http://www.finra.org/sites/default/files/NoticeDocument/p120779.pdf.

[5] FINRA Regulatory Notice 11-39, Social Media Websites and the Use of Personal Devices for Business Communications: Guidance on Social Networking Websites and Business Communications (August 2011), http://www.finra.org/sites/default/files/NoticeDocument/p124186.pdf.

[6] FINRA Rule 2210 is the primary advertising regulation which governs broker dealers' communications with the public, including communications with retail and institutional investors. Rule 2210 outlines standards for the content, approval, recordkeeping, and filing of communications with FINRA, http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=10648.

[7] The Notice defines “ongoing” as (1) the link is continuously available to investors who visit the member firm's site; (2) investors have access to the linked site whether or not it contains favorable material about the member firm; and (3) the linked site could be updated or changed by the independent third party and investors would nonetheless be able to use the link.

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