



FINRA Publishes New Guidance on Social Networking Websites and the Application of Rule 2210

In Regulatory Notice 17-18, the Financial Industry Regulatory Authority, Inc. (“FINRA”) provided additional guidance, in the form of 12 FAQs, on its earlier regulatory notices relating to the use of social media and the application of FINRA Rule 2210 (Communications with the Public). Specifically, the FAQs expand on the areas of recordkeeping, third-party posts and the use of hyperlinks to third-party sites. FINRA acknowledged that the use of social media and digital communications has expanded in the time since the last regulatory notice on the use of social media by member firms, which was in Regulatory Notice 11-29 in 2011.

Recordkeeping

The requirement that member firms retain records of communications that relate to their “business as such” under Rule 17a-4(b) of the Securities Exchange Act of 1934 applies to digital communications, including those that are made through text messaging and chat services, if the content of the communication relates to the firm’s business. Before using such services, the firm must first ensure that it can retain those business communications.

Personal Versus Business Communications

Information or links to content shared by an associated person of a member firm that do not relate to the products or services of the member firm are not subject to Rule 2210.

Adoption of or Entanglement with Outside Content

Generally, a third-party post on a social media site established by a firm or any of its personnel would not be considered a communication by the firm or its personnel and to which the Rule 2210 requirements would not apply. However, under certain circumstances, FINRA has viewed third-party posts as becoming attributable to the firm and considered communications with the public subject to Rule 2210. For example, after the third-party content was posted, if the firm or its personnel explicitly or implicitly endorsed or approved the post, then, under an adoption theory, the post would constitute a communication with the public by that firm. Or, if the firm or any of its personnel involved themselves in the preparation of the content of the third-party post, or paid for the post, then the third-party post would be considered to be a communication with the public by the firm or its personnel under an entanglement theory.¹

¹ See FINRA Regulatory Notice 10-06, available at: <http://www.finra.org/sites/default/files/NoticeDocument/p120779.pdf>.

FINRA discussed the adoption of third-party content by the member firm in several contexts:

- sharing or linking to specific content posted by independent third parties is an adoption of that content by the member firm; in that case, the member firm must ensure that the adopted content, when read in context with the statements in the originating post, complies with Rule 2210's standards applicable to firm communications;
- sharing or linking to content that in turn links to other content, if the member firm has influence or control over that other content, is an adoption by the member firm of that other content; and
- sharing or linking to content that itself is primarily a vehicle for other links, or where the content available through such links forms the entire basis of the article, is an adoption by the member firm of the content accessed through such links.

The FAQs clarify that simply sharing or linking to content that contains links to other content over which the member firm has no influence or control is not an adoption by the member firm of the content available at those other links.

If a member firm includes on its website a link to a section of an independent third-party site, whether or not the member firm has adopted the content of the other site will depend on whether the link is "ongoing" or if the member firm has influence or control over the content of the third-party site. In the latter case, the third-party content will become attributable to the member firm through an entanglement theory.

Content at a linked site will not be adopted by the member firm if the link is ongoing, which means that:

- the link is continuously available to investors who visit the member firm's site;
- investors have access to the linked site whether or not it contains favorable material about the member firm; and
- the linked site could be updated or changed by the independent third-party, and investors would still be able to use the link at the member firm's site.

Nonetheless, if the firm has any influence or control over the content of the third-party site, the content of that site will be attributable to the firm through an entanglement theory. Any language used by the member firm to introduce the link must conform to the content standards of Rule 2210(d).

If a member firm contacts a third-party publisher of an online business directory that includes information about the member firm or its registered representatives to correct factual information in the listing, and the listing was not made at the direction of the member firm or representative, then the corrected information would not be a communication by the member firm. If the firm posted a comment on the directory's site to correct the information, the comment would not be deemed an adoption of the original, incorrect information.

Native Advertising

Those advertisements that magically pop up and try and sell you something relating to the subject matter you are reading about on the internet ("native advertisements") may be employed by member firms, provided that they comply with Rule 2210's requirements, including that all communications must be fair, balanced and not misleading. Native advertisements must also prominently disclose the member firm's name, disclose any relationship between the firm and any other entity or individual who is named and disclose whether any products or services touted are offered by the member firm, all in compliance with Rule 2210(d)(3).

Paid Comments or Posts

Comments or posts paid for, or arranged by, a member firm are communications attributable to that firm under an entanglement theory. Consequently, any such post or comment should be clearly labeled as an advertisement by the member firm and include the firm's name as well as any other information required by Rule 2210.

Testimonials and Endorsements

Unsolicited third-party opinions or comments posted on a business related site supervised and retained by a member firm or its registered representative are not communications of the firm or the registered representative for purposes of Rule 2210, nor are such unsolicited opinions or comments considered to be testimonials subject to the requirements of Rule 2210(d)(6)². However, if a representative of member firm “likes” or shares favorable comments posted by third parties on the site, then the comments would be adopted by the firm or representative and would be subject to Rule 2210, including the content, supervision, recordkeeping and testimonial requirements. Disclosure of the testimonial requirements of Rule 2210(d)(6) may be made either in the interactive electronic communication itself, in close proximity to the testimonial or through a clearly marked hyperlink using language such as “important testimonial information.”³ Testimonials may not be false, misleading, exaggerated or promissory.

FINRA also reminded firms registered under the Investment Advisers Act of 1940 about the prohibitions against fraudulent, manipulative or deceptive acts or the use of any advertisement that refers to a testimonial concerning an investment adviser or any advice, analysis, report or other service rendered by the investment adviser.⁴

BrokerCheck

Member firm-created apps are not subject to the requirement to include a readily apparent reference and link to FINRA’s BrokerCheck, because Rule 2210(d)(8) specifically references firm websites. However, if the member firm-created app accesses and displays a webpage that is on the firm’s website, and that is required to include the BrokerCheck link, the firm must ensure that the link is readily apparent when that page is displayed through the app.

Conclusion

In the six years since FINRA’s last regulatory notice on the use of social media, the digital landscape has changed at lightning speed and continues to evolve. Regulatory Notice 17-18 will help FINRA members and their registered representatives understand FINRA’s current approach to digital communications and which activities will fall within the scope of Rule 2210.

² Rule 2210(d)(6) requires that if any testimonial in a communication concerns a technical aspect of investing, the person making the testimonial must have the knowledge and experience to form a valid opinion. Retail communications or correspondence providing any testimonial concerning the investment advice or investment performance of a member or its products must prominently disclose the fact that (i) the testimonial may not be representative of the experience of other customers; (ii) the testimonial is no guarantee of future performance or success; and (iii) it is a paid testimonial if more than \$100 in value is paid for the testimonial.

³ FINRA considers an “interactive electronic forum” to be a chat room, online seminar and any portion of a blog or a social networking site such as Facebook, Twitter or LinkedIn that is used to engage in real-time interactive communications. FINRA Regulatory Notice 10-06.

⁴ See Section 206(4) of the Investment Advisers Act of 1940 and Rule 206(4)-1(a)(1) thereunder.

Author

Bradley Berman
New York
(212) 336-4177
bberman@mofo.com

Additional Contact

Lloyd Harmetz
New York
(212) 468-8061
lharmetz@mofo.com

About Morrison & Foerster

We are Morrison & Foerster—a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, and Fortune 100, technology, and life sciences companies. We’ve been included on *The American Lawyer’s* A-List for 13 straight years, and *Fortune* named us one of the “100 Best Companies to Work For.” Our lawyers are committed to achieving innovative and business-minded results for our clients while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com. © 2017 Morrison & Foerster LLP. All rights reserved. For more updates, follow Thinkingcapmarkets, our Twitter feed: www.twitter.com/Thinkingcapmkt.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.