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Keeping up with Regulatory Developments Affecting Social Media Use

Teleconference

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12:00 PM – 1:00 PM EDT

Presenters:

Anna Pinedo and Bradley Berman, Morrison & Foerster LLP

1. **Presentation**
2. **FINRA Regulatory Notice 17-18**
3. **"FINRA Publishes New Guidance on Social Networking Websites and the Application of Rule 2210"**
4. **"Frequently Asked Questions about the FINRA Communication Rules"**
5. **"Frequently Asked Questions about Liability of Public Companies and Companies in Registration for Website and Social Media Content"**

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Social Media

June 2017

Growth of Social Media

Some key social media statistics

Facebook has **1.28 billion** daily active users on average for March 2017 and **1.94 billion** monthly active users as of March 31, 2017.

Twitter has over **313 million** monthly active users, sending over 500 million tweets per day, with a new account created each second.

YouTube has over **one billion** users with people watching hundreds of millions of hours on YouTube and generates billions of views.

LinkedIn has more than **500 million** members with professionals signing up to join LinkedIn at a rate of more than two new members per second.

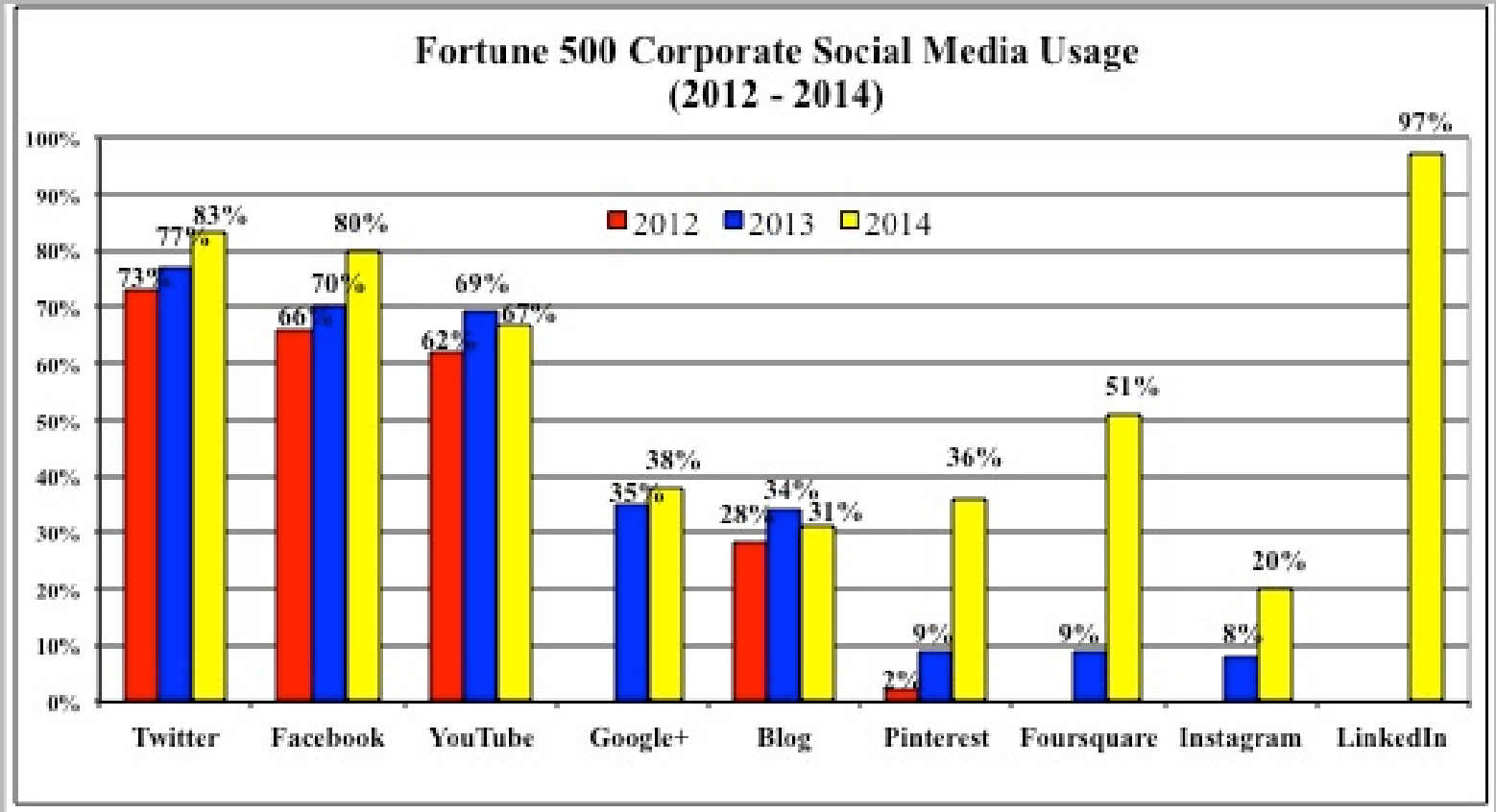
Pinterest has **53 million** monthly active users in the U.S. It crossed the 10M unique U.S. monthly visitors mark faster than any standalone website in history.

- Social media is international
- Top 10 countries in total number of Facebook users:
    1. United States
    2. India
    3. Brazil
    4. Indonesia
    5. Mexico
    6. United Kingdom
    7. Turkey
    8. Philippines
    9. France
    10. Germany

Growth of Social Media, cont'd.

Corporate Use of Blogs/Social Networks

- The vast majority of Fortune 500 companies now have Twitter profiles & Facebook Pages, and 97% of them have a LinkedIn presence



Social Media and Issuers

Social Media and Issuers

- Considerations with the use of social media by public companies:
  - Antifraud considerations with social media communications
  - Social media considerations under Regulation FD
  - The use of social media during the offering process
- Social media has been embraced by companies for many purposes, but there has been uncertainty as to the federal securities law implications of using social media to communicate information to investors

Antifraud Considerations

- Companies must consider the potential for insider trading and market manipulation concerns arising from the use of social media
- Considerations with the rapid and often informal nature of social media communications
  - Employees acting as company representatives cannot avoid responsibility for material misstatements or omissions by purporting to speak in their individual capacities
  - Does the 140-character limit of a Tweet create a heightened potential for a material misstatement or omission?

- The SEC has said that a company is not responsible for statements that third parties post on a company-sponsored website unless the company had adopted or endorsed the statements, nor does a company have any obligation to correct a misstatement made by a third party
- A company can be held liable for third party information to which it hyperlinks from its website and which could be attributable to the company through the concepts of:
  - Entanglement (involving itself with the preparation of third-party content); or
  - Adoption (explicitly or implicitly endorsing or approving third-party content)

Antifraud Considerations, cont'd.

Regulation FD

- Regulation FD provides:
  - Whenever a public company, or any person acting on its behalf, discloses material nonpublic information to certain enumerated persons, the company must disclose that information either simultaneously (in the case of intentional disclosures) or promptly (in the case of unintentional disclosures)

Regulation FD Guidance

- On April 2, 2013, the SEC issued guidance which indicates that social media channels could under certain conditions be used by public companies to disseminate material information, without violating Regulation FD
  - *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: Netflix, Inc., and Reed Hastings, Release No. 34-69729 (April 2, 2013)*
- The SEC emphasized that companies should apply the guidance from its 2008 interpretive release regarding the disclosure of material information on company websites when analyzing whether a social media channel is in fact a "recognized channel of distribution," including the guidance that investors must be provided with appropriate notice of the specific channels that a company will use in order to disseminate material nonpublic information

SEC Guidance on Use of Websites

- In Release No. 34-58288 (August 1, 2008), the SEC revisited its guidance on the use of technology to disseminate information, and provided three considerations for determining whether information posted on a corporate website is considered "public" such that a subsequent communication will not be deemed selective disclosure of material non-public information:
  - Is an issuer's website a "recognized channel of distribution?"
  - Is information posted in a manner calculated to reach investors?
  - Is information posted for a reasonable period of time so that it has been absorbed by investors?

- In the context of whether a website posting satisfies the public disclosure requirement of Regulation FD following the selective disclosure of material, non-public information, the guidance from the SEC's 2008 Interpretive Release indicates that issuers must consider whether website postings are "reasonably designed to provide broad, non-exclusionary distribution of the information to the public"
- In conducting this analysis, an issuer must examine the first two factors referenced in the prior slide, and also must consider whether its website is capable of meeting the simultaneous and prompt timing requirements under Regulation FD once a selective disclosure has been made

SEC Guidance on Use of Websites, cont'd.

- In order to facilitate an ongoing determination that a company's website is a recognized channel of distribution of material information concerning the company, it is suggested that the company take the following steps:
  - In all company communications to investors, include a statement that the company routinely posts all important information about the company on its website, and include a reference to the url of the company's website
  - Consider including a separate means to access the Investor Relations pages of the company's website from the main page of the website so that it is more readily apparent where investors may locate important information about the company that is posted on the company's website
  - Monitor the dissemination of information to determine the extent to which information reaches intended audiences and the extent to which persons access the company's website for material information about the company

SEC Guidance on Use of Websites, cont'd.

Other Considerations

- Problems with age of information on Twitter and Facebook – is the information stale?
  - No capability to archive
  - A post can be deleted, but it may not be immediately removed from the advanced search function
  - There is a website dedicated to searching for deleted tweets.
- Providing requisite disclaimers for the forward-looking statements safe harbor
- Compliance with Regulation G with respect to non-GAAP measures

- Compliance and Disclosure Interpretations Question 110.01, SEC Staff indicates that it would not object to the use of an active hyperlink to satisfy the requirements of Rule 134(b) and Rule 134(d) in limited circumstances when:
  - The electronic communication is distributed through a platform that has technological limitations on the number of characters or amount of text may be included in the communication;
  - The inclusion of the entire required statements, together with the other information in the communication, would cause the communication to exceed the limit on the number of characters or amount of text; and
  - The communication contains an active hyperlink to the required statements and prominently conveys, through introductory language or otherwise, that important or required information is provided through the hyperlink.
- The Staff points out that where an electronic communication is capable of actually including the required statements, along with the other information, without exceeding a limit on the number of characters or amount of text, then the use of the hyperlink would not be appropriate.

Other Considerations, cont'd.

- Compliance and Disclosure Interpretations Question 232.15 provides an interpretation with respect to Rule 433 under the Securities Act.
- Rule 433 provides conditions for the use of free writing prospectuses; any free writing prospectus (other than free writing prospectuses that comply with Rule 433(f)(1)) must contain the legend required by Rule 433(c)(2)(i).
- The Staff notes that, under the same conditions set forth above with respect to Rule 134, an issuer can use an active hyperlink to provide the legend required by Rule 433(c)(2)(i).

Other Considerations, cont'd.

Broker-Dealers and Social Media

Broker-Dealers and Social Media

- FINRA has long recognized the potential for compliance issues posed by the use of social media
  - 1999: Registered representative's participation in an internet chat room is subject to the same requirements as a presentation in person before group of investors
  - 2003: FINRA codified this guidance when it defined the term "public appearance" to include participation in an interactive electronic forum
  - 2009: FINRA establishes Social Media Networking Task Force
  - 2010: FINRA publishes Regulatory Notice 10-06—Social Media Web Sites: Guidance on Blogs and Social Networking Web Sites
    - 10-06 reminds firms of their recordkeeping, suitability, supervision and content requirements
    - Essentially, FINRA takes the view that all rules applicable to traditional communications are applicable to social media

- 2011: Guide to the Internet for Registered Representatives
  - FINRA is not so much concerned about the form of communication from a registered representative as it is about the content of the communication and whether the representative obtained prior supervisory approval for the communication
  - FINRA has penalized a representative who posted tweets touting a particular security without principal approval
- 2011: FINRA publishes Regulatory Notice 11-39—Social Media Websites and the Use of Personal Devices for Business Communications: Guidance on Social Networking Websites and Business Communications
  - The Notice provides additional guidance, building on the guidance provided in 10-06
- 2012: FINRA publishes podcasts concerning social media and personal electronic devices
- 2012/2013 – More firms experiment with social media; FINRA announces a sweep on social media policies
- 2017: FINRA publishes Notice 17-18, which reinforces guidance contained in Notice 10-06 and 11-39 and provides a number of questions and answers

Broker-Dealers and Social Media, cont'd.

May a Broker-Dealer Use Twitter or Facebook?

- Yes, but all communications by FINRA member firms are subject to Rule 2210
- Also, the communications may be subject to the:
  - Research rule, 2241
  - Suitability rule, 2111
  - Supervision rule, 3110
  - Recordkeeping rules, 17a-3 and 17a-4

May an Employee of a Broker-Dealer Business Discuss Securities Using Social Media?

- Yes, but, in addition to the FINRA rules discussed above, the communication could be construed as an "offer" under the Securities Act.
- An "offer" under the Securities Act includes "every attempt or offer to dispose of, or solicitation of an offer to buy, a security or an interest in a security, for value."
- Whether or not the tweet or posting is an offer would likely be construed against an employee of a dealer.
- An offer on social media would be viewed as a "written communication" because it is a "graphic communication", each as defined in Rule 405 under the Securities Act.
- There is a potential for misuse of material, non-public information, which would constitute a violation of Section 10b of the Exchange Act and Rule 10b-5 thereunder.
- The best practice is to avoid the use of social media for any communication relating to specific securities or particular issuers of securities.

Online Interactive Forum or Static Post

- Interactive content may become static
- Statistical data maintained on websites does not need to be preapproved if the member firm establishes a pre-approved template and implements procedures to monitor and verify data.
- Static post is deemed by FINRA to constitute an advertisement.
- Online Interactive Electronic Forum – is a part of a site that allows for real-time communication
  - Parts of Facebook, LinkedIn may be static and parts may be interactive.
    - For compliance purposes, there should be a distinction between static and interactive elements.
  - Twitter direct messages are viewed by FINRA as akin to email, not "interactive" communications.

When Does a Social Media Post Constitute a Recommendation?

- Facts and circumstances based question that depends on
  - Content and context
  - Whether the message is individually tailored
  - Whether reference is made to a specific security or to an investment strategy

- Examples not considered by FINRA to be recommendations:
  - A member creates a website that is available to customers or groups of customers. The website has research pages or "electronic libraries" that contain research reports (which may include buy/sell recommendations from the author of the report), news, quotes, and charts that customers can obtain or request.
  - A member has a search engine on its website that enables customers to sort through the data available about the performance of a broad range of stocks and mutual funds, company fundamentals, and industry sectors. The data is not limited, for instance, to, and does not favor, securities in which the member makes a market or has made a "buy" recommendation. Customers use and direct this tool on their own. Search results from this tool may rank securities using any criteria selected by the customer, and may display current news, quotes, and links to related sites.

- A member provides research tools on its website that allow customers to screen through a wide universe of securities (e.g., all exchange-listed and Nasdaq securities) or an externally recognized group of securities (e.g., certain indexes) and to request lists of securities that meet broad, objective criteria (e.g., all companies in a certain sector with 25 percent annual earnings growth). The member does not impose limits on the manner in which the research tool searches through a wide universe of securities, nor does it control the generation of the list in order to favor certain securities.
- A member allows customers to subscribe to e-mails or other electronic communications that alert customers to news affecting the securities in the customer's portfolio or on the customer's "watch list." Such news might include price changes, notice of pre-scheduled events (such as an imminent bond maturation), or generalized information. The customer selects the scope of the information that the firm will send to him or her.

When does a communication constitute a "research report"?

- Examples of tweets that do not come within Rule 2241 are:
  - *An update on protests in Hong Kong and the impact they could have on companies with operations there;*
  - *A summary of quarterly results for companies in the mortgage sector; and*
  - *A notice that the firm is changing its recommendation for securities of Best Buy from a Hold to a Sell.*
- Research analysts' social media postings have come under FINRA scrutiny:
  - A research analyst who posted on his Twitter account to over 50 followers was disciplined by FINRA for:
    - Not disclosing that he owned shares of the subject security;
    - Failure to provide a fair and balanced presentation; and
    - Failure to provide a sound basis for evaluating certain facts discussed therein.

Links and third-party posts

- A broker-dealer may become responsible for third-party posts, as well as for “recommendations” or “endorsements”
- Responses to third-party posts: firms will want to consider a policy in respect of responding to third-party posts; blocking/screening third-party posts; publishing their policies regarding third-party posts
- Data feeds and “financial tools” provided by a broker-dealer (or its personnel) also must be managed and tested

- The SEC in its releases has referred to various theories of liability. An issuer or a broker-dealer may be responsible for third-party content if: it was involved in preparing the information; or it explicitly or implicitly endorses the information.
- Has broker-dealer "adopted" the information?
- This can be determined by considering:
  - The content of the link: what is being said about the link, or the reason why the link is provided
  - The possibility for confusion: is a reader likely to be confused about the source of the information
  - The presentation of the information
    - the SEC seems to place weight on the proximity of information and has discussed proximity and placement in the context of its "cul-de-sac" and "envelope" theories
- Disclaimers: a disclaimer alone is likely insufficient to mitigate liability

Links and Third-Party Posts, cont'd.

- Notice 17-18 provides additional guidance relating to testimonials and endorsements
- FINRA reminds member firms that are also RIAs that SEC rules generally prohibit RIAs from publishing, circulating, or distributing any advertisement which includes or refers to any testimonial regarding its services.
- For standalone broker-dealers FINRA does not consider unsolicited third-party opinions or comments posted on a social network to be firm communications and, as a result, those third-party opinions or comments are not subject to Rule 2210.
- However, if the firm or a registered representative likes or shares the unsolicited third-party opinion or comment, then the content may be "adopted" and the adoption would subject the comment to Rule 2210, including that rule's requirements related to testimonials.

Links and Third-Party Posts, cont'd.

Hyperlinks

- Notice 17-18 provides additional insight on hyperlinks and third-party posts
- When a member firm shares or links to specific content, then, FINRA will take the view that the firm has adopted that content, and must ensure that the adopted content complies with FINR Rule 2210.
- If the firm links to a third-party site that is dynamic, ongoing and not influenced by the firm, then the firm is not responsible for the content. FINRA member firms cannot link to any third-party site if the firm knows or has reason to believe that the site contains false or misleading content.
- Correction of third-party content: Provided that the member firm has not adopted or entangled itself with third-party content, the member firm can contact an unaffiliated third-party publisher to correct factual information related to a directory listing created by the publisher without invoking Rule 2210.

BrokerCheck

- Notice 17-18 provides some clarifications relating to the disclosure or link to BrokerCheck
- Rule 2210(d)(8) requires a firm to include a readily apparent reference and hyperlink to BrokerCheck on the firm's website only.
- The requirement is not applicable to communications appearing on third-party websites, firm emails, text messages, or applications created by the firm.
- But, 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.

Native Advertising

- Notice 17-18 addresses native advertising, which has become more commonplace
- If a member firm uses native advertising, the ad must conspicuously disclose the firm's name, any relationship between the firm and any other entity or individual named in the ad, and identify the products and/or services included in the ad that are offered by the firm.
- Any such ads must be fair, balanced, and not misleading.
- If a firm has arranged or paid for the production or distribution of any communication, entanglement exists and the communication becomes subject to Rule 2210.

Recordkeeping

- Rules 17a-3 and 17a-4 under the Exchange Act: a broker-dealer must retain electronic communications made by the firm and associated persons relating to the firm's business
  - Is the communication "business related"?
  - Rules are the same for "static" and "interactive" communications, although supervisory rules may differ
  - Cannot sponsor or use sites that automatically erase or delete content
  - It may be prudent to archive content at links; some links become inactive
  - Third-party posts also may be subject to recordkeeping requirements, depending on facts and circumstances
- Text messaging: Notice 17-18 notes that if a member firm or its registered representatives use text messaging to communicate with clients, the member firm must retain records. The Notice makes clear that FINRA is focused on the substance of the message that is being transmitted.

Supervision and Training

- A broker-dealer is required to establish and maintain a system to supervise the activities of each associated person that is reasonably designed to ensure compliance with applicable FINRA rules
  - Sites should be approved for business use
  - Prior to permitting associated person to use the site, associated person must have undergone training so that there is some assurance that the associated person can comply with applicable FINRA rules
  - Firm should supervise the site
    - This may include reviewing the first post in any interactive forum
    - Implementing a post-use review process, which may be undertaken using search technologies
    - Conducting random "spot checks"
    - Requiring annual or periodic compliance certifications
    - Implementing policies regarding links to third-party postings/responding to third-party posts

Private Fund Marketing

Private Funds

- Is the private fund advised by a registered investment adviser?
  - Many large broker-dealers are dual registered
  - Growing use of social media by registered investment advisers presents compliance challenges
  - Rule 206(4)-7 requires RIA firms using social media to adopt and periodically review the effectiveness of policies and procedures regarding social media, especially in the fact of rapidly changing technology

Private Funds - RIAs

- Division of Investment Management provided guidance to RIAs that use social media (Jan 2012)
  - Compliance program related to use of social media
    - Factors to consider when evaluating effectiveness of compliance program
      - Usage guidelines
      - Content standards
      - Monitoring
      - Frequency of monitoring
      - Approval of content
      - Firm resources
      - Criteria for approving participation
      - Training
      - Certification
      - Functionality
      - Personal/professional sites
      - Information security
      - Enterprise wide sites

Private Funds - Recordkeeping

- Recordkeeping
  - Rule 204-2 requires RIAs to keep certain books and records related to their advisory business
  - Rules do not distinguish between various media, including paper and electronic communications, such as e-mails, IMs and other electronic communications
  - SEC Staff urges RIAs to review document retention policies to ensure that they retain required records for requisite time periods (generally five years)

- Advisers should determine whether each type of social media communication is a required record and, if so, the applicable retention period and accessibility
  - Form of retention
  - Employee training
  - Indexing of records
  - Periodic test checking (i.e., key word searches)
  - Third-party recordkeepers

Recordkeeping, cont'd.

Private Funds - CPOs

- Is the private fund a CPO? Or a CTA?
- If it is a CPO, it (and its principals and adviser) will be subject to
  - CFTC Rule 4.41
    - Communications must not be deceptive
    - The use of any testimonial is subject to special requirements
    - The use of hypothetical performance information is prohibited, subject to certain exceptions
  - NFA Rule 2-29
    - Communications cannot contain any material misstatement or material omission
    - Communication must be fair and balanced, and cannot mention possibility of profit without an equally prominent statement regarding risk of loss

Private Funds and General Solicitation

- Rule 506 was amended by the SEC to permit general solicitation; general solicitation requires certain investor verification requirements
- A number of private funds that were considering using general solicitation were deterred from doing so to the extent that such funds were CPOs until the CFTC issued exemptive relief
- CFTC exemptive relief addresses only 4.13 and 4.7 for CPOs that are relying on the JOBS Act and using general solicitation or general advertising
  - Relief requires the CPO to affirmatively notify the CFTC, provide basic information about whether CPO is claiming relief to use general solicitation in a Rule 506 or Rule 144A offering, and make a representation, but is then immediately effective upon filing
  - Relief does not address CTAs or address other CFTC rules and regulations
  - Relief requires a fund to state that it is conducting an offering
  - Relief does not address the verification process for investors

Investment Advisers & Their Portfolio Companies

Investment Advisers & Their Portfolio Companies

- With the proliferation of social media, investment advisers increasingly have used social media for various purposes, including to communicate with new and existing clients, promote services, educate investors, market portfolio companies and recruit new employees.
- The growth in use of social media and the rapid and often informal nature of such communications presents various challenges for investment advisers, including with respect to:
  - Balancing regulatory concerns/requirements of the Investment Advisers Act of 1940 (the "Advisers Act") and other securities laws with the National Labor Relations Act ("NLRA")
  - Implementing a compliance program to:
    - Monitor and supervise employee activity and content of posts
    - Maintain appropriate records

Social Media Content – Focus Areas

- Social media communications in general present challenges for advisers in their ability to review the content of such communications to ensure compliance with federal securities laws and applicable SEC guidance as well as ensuring the firm is presenting a consistent message across various platforms.
- The following categories of social media communications present different challenges for the investment advisers:
  - Testimonials & Third Party Commentary
  - Fan and Community Pages
  - Marketing Communications

Testimonials & Third-Party Commentary

- Testimonials generally are prohibited
  - Rule 206(4)-1(a)(1) under the Advisers Act prohibits investment advisers from using testimonials in their advertisements.
- What is a testimonial?
  - While the rule does not define the term "testimonial," in March 2014, the Division of Investment Management issued guidance regarding the use of "testimonials" in social media which stated that the Staff has interpreted a testimonial to mean "a statement of a client's experience with, or endorsement of, an investment adviser."
  - The SEC staff attempted to draw a line between endorsements and legitimate third-party commentary
- Public commentary made by a client endorsing an adviser, or a statement made by a third-party about a client's experience with the adviser, may be a testimonial
  - Whether public commentary on a social media site constitutes a testimonial depends on the facts and circumstances relating to the statement

- Under certain circumstances, testimonials may be used by an adviser.
  - Testimonials must be presented in a content-neutral manner that is not false or misleading (i.e., positive and negative commentary must be given equal prominence).
- For example, an adviser's publication of all of the testimonials about the investment adviser from an independent social media site on the adviser's own social media site or website would not implicate the concerns underlying the testimonial rule.

Testimonials & Third-Party Commentary, cont'd.

- Advisers may not publish public commentary on their website that is an explicit or implicit statement of a client's experience with the adviser
  - Commentary posted directly on the adviser's website, blog or social media site that touts the adviser's services are prohibited testimonials
- Advisers won't necessarily violate the testimonial rule if they publish commentary originating from an independent social media site on their own websites or social media sites, provided:
  - The independent social media site provides content that is *independent of the investment adviser or its representative*
  - There is no *material connection* between the independent social media site and the investment adviser or its representative that would "call into question the independence" of the independent social media site or its commentary
  - The investment adviser or representative *publishes all of the unedited comments* appearing on the independent social media site regarding the adviser or representative

Testimonials & Third-Party Commentary, cont'd.

- Content is not "independent" if the adviser or its representative had a hand in authoring the commentary, directly or indirectly.
  - For example, paying a client (or offering a discount to a client) for saying nice things would implicate the testimonial rule
- Advisers may <u>not</u> use testimonials from independent social media sites that directly or indirectly emphasize commentary favorable to the adviser, or downplay unfavorable commentary
- Advisers may publish commentary from an independent social media site that includes a mathematical average of the public commentary—for example, based on a ratings system that is not preordained to benefit the adviser

Testimonials & Third-Party Commentary, cont'd.

Fan and Community Pages

- A third party's creation and operation of unconnected community or fan pages generally would <u>not</u> implicate the testimonial rule
- However, the staff *strongly cautions* advisers and their employees that publishing content from those sites or directing user traffic to those sites if they do not meet the *no material connection* and *independence* conditions described above may implicate the testimonial rule

Varying Approaches to Compliance

- Conservative approach
  - Prohibit postings by general public on an adviser's social media pages
- Use of disclaimers
  - Some advisers post disclaimers of responsibility in attempt to avoid liability for postings
  - May not sufficiently mitigate risk
- Removal of postings
  - Some advisers periodically delete posts after a pre-established time period
  - Fraudulent or intentionally malicious posts

Reporting of Social Media Use

- Form ADV requires registered investment advisers and exempt reporting adviser to report information about social media use (2016)
- An adviser must report in Item 1 "all publicly available social media platforms where the adviser has a presence for which it controls the content." The adviser must:
  - Include the address of each of the adviser's websites
  - Report sites even if such platforms are only used to market business outside the United States or toward non-US clients
- However, the SEC has made clear that an RIA is not required to provide individual email addresses of employees or address of employee accounts on publicly available social media platforms

Employee Use of Social Media

Work vs. Personal Social Media Use

- Companies can exercise greater control over employees' work-related social media activity than over their personal social media activity
- Companies have relatively greater control over employee social media activity
  - During working hours versus outside of working hours (including meals and breaks)
  - Speaking on the company's behalf versus speaking as an individual
  - Using company equipment/accounts versus using personal devices/accounts

Hypotheticals

How Should You Think about Posting "General" Content?

- Examples
  - Personal finance information that does not reference a specific security
    - Planning for Retirement
    - Managing your Debts
    - Understanding 529 Accounts
  - What if personal finance perspectives are discussed and specific investment strategies are mentioned?
  - What about posts containing economic trends not related to the Firm's products?
  - What about research regarding macro trends that is related to a specific product?
    - For example: *"Biotech stocks continue to perform well. You may access our biotech industry research here, and may be interested in our Biotech-Linked Notes."*

What about Personal Social Media Accounts of Registered Reps?

- Can a broker on his personal social media account include:
  - Participation in a volunteer activity?
    - For example, *X is participating in firm's Annual Habitat for Humanity Day*
  - A personal news story?
    - For example, *see this month's Alumni Newsletter for a profile of me*.
  - Awards or rankings?
    - For example, *here are the most recent Institutional Investor rankings*
  - Participation at a conference?
    - For example, *X will be presenting on May 4 at the firm's Asia Conference discussing the Japanese economy*.
  - A video of an interview from CNBC?

- Can a firm assume that all communications by a broker using the broker's personal device are "personal communications"?
- Can a broker on his personal social media account include:
  - A post regarding a public release
    - U.S.: *GreenCo Announces Debt Facility with FIRM to Finance Energy Efficiency Loans*
    - *GreenCo, a leading clean-energy consumer finance company, announced that it closed a $100 million debt facility from FIRM to finance energy efficiency loans for homeowners.*
  - Tweets
    - Live tweets from conferences focused on macroeconomic themes: European Credit Conference, FinTech, Mobile World Congress, Davos?
    - Summaries from Research & Equities conferences (daily recap sharing)?
    - Twitter chats moderated by media partner (FT, The Economist, WSJ) OR hosted and run by FIRM on a particular macro issue (#greenenergy, #bitcoin, etc.)?

What about Personal Social Media Accounts of Registered Reps? cont'd.

Supervisory and Recordkeeping Examples

- Firms are required to adopt supervisory and recordkeeping policies and procedures.
  - Firm X has established a policy that limits social media use to approved sites only and has provided guidelines for post as and other forms of communications. Firm X does not require principal review of each interactive communication
    - Can Firm X rely on post-use review only?
    - Can Firm X rely on a sampling procedure only?
  - Firm X has identified key words that suggest which posts and communications are "business-related."
    - Can Firm X limit its post-use review only to communications using the key words?
    - Limit its review to items flagged by a vendor?
    - Can a firm use Lexicon-based review? Random reviews? A combination? How should the firm evaluate its review?

Social Media Site Features

- Firm X allows its brokers to use Facebook and LinkedIn communications provided that on each channel the broker uses an approved template.
  - A Facebook friend posts a “like” in response to a public release or in response to a news story. Would the “like” constitute adoption of, or endorsement of the posted story?
  - Would a “like” feature be considered a testimonial or an endorsement of the broker’s performance or track record?
  - Would a site that shows a list of “friends” or “contacts” be considered a testimonial?

Regulatory Notice 17-18

Social Media and Digital Communications

Guidance on Social Networking Websites and Business Communications

April 2017

Notice Type
- Guidance

Suggested Routing
- Advertising
- Compliance
- Legal
- Marketing
- Operations
- Registered Representatives
- Senior Management

Key Topics
- Business Communications
- Communications with the Public
- Digital Communications
- Native Advertising
- Recordkeeping
- Social Media
- Supervision

Referenced Rules and Notices
- FINRA Rule 2210
- FINRA Rule 4511
- Regulatory Notice 08-27
- Regulatory Notice 10-06
- Regulatory Notice 11-39
- Regulatory Notice 15-50
- SEA Rules 17a-3 and 17a-4

Summary

This *Notice* provides guidance regarding the application of FINRA rules governing communications with the public to digital communications, in light of emerging technologies and communications innovations.

Questions concerning this *Notice* may be directed to:

- Joseph E. Price, Senior Vice President, Advertising Regulation/Corporate Financing, at (240) 386-4623, *Joseph.Price@finra.org*;
- Thomas A. Pappas, Vice President, Advertising Regulation, at (240) 386-4553, *Tom.Pappas@finra.org*; or
- Amy C. Sochard, Senior Director, Advertising Regulation, at (240) 386-4508, *Amy.Sochard@finra.org*.

Background

Previously, FINRA issued *Regulatory Notice 10-06* and *Regulatory Notice 11-39* to provide guidance on the application of FINRA rules governing communications with the public to social media sites and the use of personal devices for business communications. The *Notices* also remind firms of the recordkeeping, suitability, supervision and content requirements for such communications. Effective February 4, 2013, FINRA adopted amendments to Rule 2210 that codify guidance provided in the *Notices* with respect to the supervision of interactive social media posts by member firms.[1] In December 2014, FINRA published the Retrospective Rule Review Report: Communications with the Public, which recommended that FINRA consider more guidance. This Notice provides further guidance. It is not intended to alter the principles or the guidance provided in prior *Regulatory Notices*.

Financial Industry Regulatory Authority

An October 2015 study from the Pew Research Center indicates that 65 percent of adults use social networking sites as compared to 7 percent in 2005.[2] Social media and other websites frequently enable the use of "native advertising," which has been defined as advertising content that matches the form and function of the platform on which it appears.[3] Media articles have predicted that within the next five years revenue earned from native advertising in online publications such as periodicals and social media sites will outstrip other forms of online display advertising.[4]

An April 2015 Pew Research Center report stated that based on a telephone survey of 2,002 adults conducted in December 2014, 64 percent of American adults own a smart phone of some kind.[5] The same report indicated that based on a sampling survey of 1,635 respondents, 97 percent of smartphone owners used text messaging at least once during the 10-day study period in November 2014 making it the most widely used basic feature or application. In April 2016, Facebook Messenger reported 900 million monthly active users, and WeChat reported in March 2016 that it had added nearly 200 million monthly active users in the previous year. Consistent with these trends, firms have increasingly raised new questions regarding the application of FINRA rules to social media and digital communications.

Past Guidance

Recordkeeping

Regulatory Notices 10-06 and *11-39* remind firms of their obligation to retain records of digital communications that relate to their "business as such" as required by Rule 17a-4(b)(4) under the Securities Exchange Act of 1934 (SEA).[6] *Regulatory Notice 11-39* notes that determining whether a communication must be retained depends on its content and not upon the type of device or technology used to transmit the communication. The Notice also reminds firms that they must train and educate their associated persons regarding the differences between business and non-business communications and the measures required to ensure any business communication made by associated persons is retained, retrievable and supervised.

Third-Party Posts

Regulatory Notice 10-06 states that, as a general matter, posts by customers or other third parties on social media sites established by a firm or its personnel do not constitute communications with the public by the firm or its associated persons under Rule 2210; therefore, the pre-use principal approval, content and filing requirements of the rule do not apply to these posts. The same principle is generally true of posts by customers or other third parties on any website established by a firm or its associated persons, regardless of whether the site is part of a social network.

There are exceptions. *Regulatory Notice 10-06* states that third-party posts on a firm or associated person's business website may constitute communications with the public by the firm or an associated person under Rule 2210 if the firm or an associated person has (1) paid for or been involved in the preparation of the content (which FINRA would deem to be "entanglement") or (2) explicitly or implicitly endorsed or approved the content (which FINRA would deem to be "adoption").[7]

Hyperlinks to Third-party Sites

Regulatory Notice 11-39 states that a 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 indicate the linked site contains false or misleading content. The *Notice* also advises firms that they are responsible under the communications rules for content on a linked third-party site if the firm has adopted or has become entangled with its content. For example, a firm may have "adopted" third-party content if the firm indicates that it endorses the content on the third-party site or may be "entangled" with a third-party site if, for example, it participates in the development of the content on the third-party site.

Questions & Answers

The following questions and answers provide guidance only with respect to FINRA rules and do not interpret the rules of the SEC or any other federal or state agency.

Text Messaging

Q1: Investors have sought to interact with registered representatives through text messaging applications ("apps") and chat services. Is a firm required to retain records of communications related to its business that are made through text messaging apps and chat services?

A: Yes. As with social media, every firm that intends to communicate, or permit its associated persons to communicate, with regard to its business through a text messaging app or chat service must first ensure that it can retain records of those communications as required by SEA Rules 17a-3 and 17a-4 and FINRA Rule 4511. SEC and FINRA rules require that, for record retention purposes, the content of the communication determines what must be retained.[8]

Personal Communications

Q2: If an associated person of a firm in a personal communication shares or links to content that the firm makes available in its communications that does not concern the firm's products or services, would the associated person's communication be subject to Rule 2210? For example, if the associated person posts information about the firm's sponsorship of a charitable event, a human interest article, an employment opportunity, or employer information covered by state and federal fair employment laws, would the communication be subject to Rule 2210?

A: No. Whether a communication by an associated person is subject to Rule 2210 depends on whether the content relates to the products or services of the firm.

Hyperlinks and Sharing

Q3: If a firm shares or links to specific content posted by an independent third-party such as an article or video, has the firm adopted the content?

A: By sharing or linking to specific content, the firm has adopted the content and would be responsible for ensuring that, when read in context with the statements in the originating post, the content complies with the same standards as communications created by, or on behalf of, the firm.

Q4: Based on the previous question and answer, if the shared or linked content itself contains links to other content, has the firm adopted the content available at these additional links?

A: Solely by sharing or linking to content that contains links, a firm would not be responsible for the content available at such links. Additional facts and circumstances will determine whether the firm has adopted or become entangled with such content. In general, if a firm shares or links to content that in turn links to other content over which the firm has no influence or control, the firm would not have adopted the other content. In contrast, if a firm shares or links to content that in turn links to other content over which the firm *has* influence or control, the firm would then have adopted that other content.

In addition, where the firm shares or links to content that itself serves primarily as a vehicle for links, or where content available through such links forms the entire basis of the article, the firm would have adopted the other content accessed through such links (*e.g.*, a firm reposts a microblog post that promotes content through a link, or a firm links to a webpage made up largely of a link or links to other content).

Q5: If a firm includes on its website a link to a section of an independent third-party website, has it adopted the content of the third-party website?

A: Whether a firm has adopted the content of an independent third-party website or any section of the website through the use of a link is fact dependent. Two factors are critical to the analysis: (1) whether the link is "ongoing" and (2) whether the firm has influence or control over the content of the third-party site.

The firm has not adopted the content if the link is "ongoing," meaning:

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

However, if the firm has any influence or control over the content of the third-party site, then the firm would be entangled with its content. Further, language introducing the ongoing link must conform to the content standards of the communications rules, including the prohibition of misleading or inaccurate statements or claims. Finally, as stated in *Regulatory Notice 11-39*, a 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.

Native Advertising

Q6: Native advertising has been defined as content that bears a similarity to the news, feature articles, product reviews, entertainment and other material that surrounds it online. For example, native advertising may be a video or article posted by an advertiser on an independent third party publisher's site that is presented alongside, and in a manner similar to, content posted by the publisher. Is native advertising inherently misleading under FINRA's communications rules?

A: Firms may use native advertising that complies with the applicable provisions of FINRA Rule 2210, including the requirements that firms' communications be fair, balanced and not misleading. In particular, native advertising must prominently disclose the firm's name, reflect accurately any relationship between the firm and any other entity or individual who is also named, and reflect whether mentioned products or services are offered by the firm as required by Rule 2210(d)(3).[9]

Q7: May firms arrange for comments or posts by an individual (an "influencer") that promote the firm's brand, products or services?

A: Where a firm has arranged for a comment or post to be made, FINRA would regard the firm as entangled with the resulting communication. For example, Regulatory Notice 08-27 states, "If a firm or representative has paid for the publication, production or distribution of any communication that appears to be a magazine, article or interview, then the communication must be clearly identified as an advertisement. FINRA regards this information as material to ensuring that such communications are not misleading." Consistent with this guidance and the prohibition of misleading or false communications in Rule 2210, firms should clearly identify as advertisements any communications that take the form of comments or posts by influencers and include the broker-dealer's name as well as any other information required for compliance with Rule 2210.

Testimonials and Endorsements

Q8: Social networking websites may allow individuals who have connected to another user on the network to give an opinion of, or provide comments regarding, the user's professional capabilities. If the user is a registered representative who has established a business-related site on the social network that is supervised and retained by the broker-dealer, are these opinions or comments considered testimonials for purposes of FINRA's communications rule?

A: FINRA does not regard unsolicited third-party opinions or comments posted on a social network to be communications of the broker-dealer or the representative for purposes of Rule 2210, including the requirements related to testimonials in paragraph (d)(6).

Rule 2210(d)(6), Testimonials, states that:

> (A) 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.
>
> (B) Retail communications or correspondence providing any testimonial concerning the investment advice or investment performance of a member or its products must prominently disclose the following:
>
> > (i) The fact that the testimonial may not be representative of the experience of other customers.
> >
> > (ii) The fact that the testimonial is no guarantee of future performance or success.
> >
> > (iii) If more than $100 in value is paid for the testimonial, the fact that it is a paid testimonial.

Q9: A third party may post unsolicited favorable comments about a registered representative on the representative's business-use social media website. The representative may then like or share the comments. Under these circumstances, are the third-party comments deemed to be a communication of the representative and, therefore, subject to FINRA's communications rules?

A: By liking or sharing the favorable comments, the representative has adopted them and they are subject to the communications rules, including the prohibition on misleading or incomplete statements or claims, the testimonial requirements noted above, and the supervision and recordkeeping rules.[10]

Q10: How may a registered representative or firm include the disclosures required for a testimonial in an interactive electronic communication?

A: The disclosures may be provided in the interactive electronic communication itself in close proximity to the testimonial or the disclosures may be made through a clearly marked hyperlink accompanying the testimonial using language such as **"important testimonial information,"** provided of course that the testimonial is not false, misleading, exaggerated or promissory.

Firms registered under the Investment Advisers Act of 1940 (Advisers Act) should be aware that Section 206(4) generally prohibits any investment adviser from engaging in any act, practice or course of business that the Commission, by rule, defines as fraudulent, deceptive or manipulative. In particular, Advisers Act Rule 206(4)-1(a)(1) states that "[i]t shall constitute a fraudulent, deceptive, or manipulative act, practice, or course of business . . . for any investment adviser registered or required to be registered under [the Advisers Act], directly or indirectly, to publish, circulate, or distribute any advertisement which refers, directly or indirectly, to any testimonial of any kind concerning the investment adviser or concerning any advice, analysis, report or other service rendered by such investment adviser."

Correction of Third-party Content

Q11: Suppose that an unaffiliated third-party publisher posts an online directory of businesses and includes information about registered representatives of a broker-dealer. Neither the firm nor the registered representatives requested, solicited or paid for the posting of these listings. If the firm or representative contacts the publisher to alert it to a factual error (*e.g.*, a misspelled name; incorrect street, website or email address; incorrect phone numbers), would the corrected listings be considered a communication of the firm or the representative?

A: When the correction pertains to factual information related to the directory listing alone, the fact that the firm or representative contacted the publisher would not mean that the corrected listing is a communication of the firm or the representative. Firms also may correct the error by posting a comment on the listing that includes the correct information without being deemed to have adopted the original, incorrect listing.

BrokerCheck

Q12: As announced in *Regulatory Notice 15-50*, effective June 6, 2016, FINRA amended Rule 2210 to require each of a firm's websites to include a readily apparent reference and hyperlink to BrokerCheck on (1) the initial web page that the firm intends to be viewed by retail investors, and (2) any other web page that includes a professional profile of one or more registered persons who conduct business with retail investors. To assist firms in complying with this new requirement, FINRA developed *BrokerCheck-related icons and similar resources*. *Regulatory Notice 15-50* states that a firm need not include a readily apparent reference and hyperlink to BrokerCheck from communications appearing on a third-party website including social media sites or in email or text messages. Does the requirement to include a readily apparent reference and hyperlink to BrokerCheck apply to an app created by a firm?

A: No. Because Rule 2210(d)(8) specifically references websites, there is no requirement to include a reference and hyperlink to BrokerCheck in an app. However, if an app accesses and displays a webpage on the firm's website that is required to include the BrokerCheck link under the rule, the firm must ensure that the link is readily apparent when the page is displayed through the app.

Endnotes

1. Rule 2210(b)(1)(D) excepts from the prior-to-use principal approval requirement of Rule 2210(b)(1)(A) retail communications posted on an online interactive electronic forum that the firm supervises and reviews in the same manner as correspondence as set forth in Rule 3110(b) and 3110.06 through .09. Rule 2210(c)(7)(M) excludes from filing with FINRA's Advertising Regulation Department any retail communication that is posted on an online interactive electronic forum. FINRA provided additional guidance regarding these exceptions in a question and answer published in *Regulatory Notice 15-17*.
2. *See* Andrew Perrin, Pew Research Center, Internet Science & Tech, *Social Media Usage: 2005-2015* (October 8, 2015).
3. In its *Native Advertising: A Guide for Business*, the Federal Trade Commission (FTC) describes native advertising as "content that bears a similarity to the news, feature articles, product reviews, entertainment, and other material that surrounds it online."
4. *See* *Business Insider, "Native ads will drive 74% of all ad revenue by 2021,"* (June 14, 2016) and *The Huffington Post, "2016 Native Advertising Trends For Publishers"* (June 21, 2016).
5. *See* Aaron Smith, Pew Research Center, Internet, Science & Tech, *U.S. Smartphone Use in 2015* (April 1, 2015).

6. SEA Rule 17a-4(b) requires broker-dealers to preserve certain records for a period of not less than three years, the first two in an easily accessible place. Among these records, pursuant to SEA Rule 17a-4(b)(4), are "[o]riginals of all communications received and copies of all communications sent (and any approvals thereof) by the member, broker or dealer (including inter-office memoranda and communications) relating to its business as such, including all communications which are subject to rules of a self-regulatory organization of which the member, broker or dealer is a member regarding communications with the public." *See also* FINRA Rule 2210(b)(4)(A) (requiring retention of communications with the public) and FINRA Rule 4511 (requiring members to make and preserve books and records).

7. The SEC first articulated these approaches as a basis for a company's responsibility for third-party information that is hyperlinked to its website. See Commission Guidance on the Use of Company Web Sites, SEC Rel. No. 34-58288 (Aug. 1, 2008), 73 Fed. Reg. 45862, 45870 (Aug. 7, 2008); Use of Electronic Media, SEC Rel. No. 33-7856 (April 28, 2000), 65 Fed. Reg. 25843, 25848-25849 (May 4, 2000). FINRA applies a similar analysis to third-party posts on social media or other websites established by the firm or its personnel. *See also* IM Guidance Update No. 2014-04, Guidance on the Testimonial Rule and Social Media (March 2014) for more information.

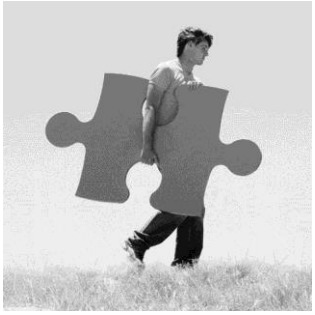
8. *See* SEC Rel. No. 34-37182 (May 9, 1996), 61 Fed. Reg. 24644 (May 15, 1996); SEC Rel. No. 34-38245 (Feb. 5, 1997), 62 Fed. Reg. 6469 (Feb. 12, 1997); *Notice to Members 03-33 (July 2003)*; and SEC Office of Compliance Inspections and Examinations National Examination Risk Alert, Investment Adviser Use of Social Media, (January 4, 2012) .

9. *See also*, the guidance provided in the FTC's Enforcement Policy Statement on Deceptively Formatted Advertisements, December 22, 2015.

10. In *Regulatory Notice 11-39*, FINRA stated: "The fact that the firm has a policy of routinely blocking or deleting certain types of content in order to ensure the content is appropriate would not mean that the firm had adopted the content of the posts left on the site. For example, most firms using social media sites block or screen offensive material. Such a policy would not indicate that the firm has adopted the remaining third-party content."

Client Alert

May 2, 2017



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.

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[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 Contacts

Jay Baris
New York
(212) 468-8053
jbaris@mofo.com

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

FREQUENTLY ASKED QUESTIONS ABOUT THE FINRA COMMUNICATION RULES

Understanding Financial Industry Regulatory Authority, Inc. Rule 2210, Communications with the Public

What is Rule 2210, and what does it require?

Rule 2210 governs three categories of "communications" by FINRA member firms:

- Institutional communications;
- Retail communications; and
- Correspondence.

The Rule sets forth requirements relating to approval, review and recordkeeping of communications; filing requirements and review procedures; and content standards. The Rule became effective on February 4, 2013.[1]

As discussed below, the Rule's general content standards apply to all communications, and are meant to ensure communications that are fair, balanced and not misleading. Retail communications are subject to the highest degree of regulation under the Rule.

Do the Rule's requirements distinguish between communications that relate to registered or exempt securities, structured products or instruments that may not be viewed as securities?

In almost all cases, no. The Rule focuses mainly on the nature of the addressee of the communication, rather than on the type of instrument described in the communication. A communication made to an investor regarding a security or regarding a product that, in some circumstances, may not be viewed as a security, will be covered by the Rule. Consequently, communications to investors regarding registered securities, exempt securities or non-securities are subject to the Rule's requirements.

What is "correspondence"?

"Correspondence" means any written (including electronic) communication that is distributed or made available to 25 or fewer retail investors within any 30 calendar day period.

Source: Rule 2210(a)(2)

What is a "retail communication"?

"Retail communication" means any written (including electronic) communication that is distributed or made available to more than 25 retail investors within any 30 calendar day period.

Source: Rule 2210(a)(5)

[1] FINRA recently conducted a retrospective rule review process of Rule 2210. *See* FINRA Regulatory Notice 14-14 at http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p479810.pdf.

What is an "institutional communication"?

An "institutional communication" means any written (including electronic) communication that is distributed or made available only to institutional investors, but does not include a member's internal communications.

Source: Rule 2210(a)(3)

Is a sales script intended for use with retail customers a retail communication?

Yes. Telemarketing and other sales scripts used with more than 25 retail investors within a 30-day period are retail communications.

Who is a "retail investor"?

"Retail investor" means any person other than an institutional investor, regardless of whether the person has an account with a member.

Source: Rule 2210(a)(6)

Who is an "institutional investor"?

An "institutional investor" means any:

(A)
- Bank, savings and loan association, insurance company or registered investment company;
- Investment adviser registered either with the Securities and Exchange Commission (the "SEC") under Section 203 of the Investment Advisers Act of 1940 or with a state securities commission (or any agency or office performing like functions); or
- Other person (whether a natural person, corporation, partnership, trust or otherwise) with total assets of at least $50 million,

regardless of whether the person has an account with a member;

(B) governmental entity or subdivision thereof;

(C) employee benefit plan, or multiple employee benefit plans offered to employees of the same employer, that meet the requirements of Section 403(b) or Section 457 of the Internal Revenue Code and in the aggregate have at least 100 participants, but does not include any participant of those plans;

(D) qualified plan, as defined in Section 3(a)(12)(C) of the Securities Exchange Act of 1934 ("Exchange Act"), or multiple qualified plans offered to employees of the same employer, that in the aggregate have at least 100 participants, but does not include any participant of those plans;

(E) FINRA member or registered person of that member; and

(F) person acting solely on behalf of any such institutional investor.

No member may treat a communication as having been distributed to an institutional investor if the member has reason to believe that the communication or any excerpt thereof will be forwarded or made available to any retail investor.

Source: Rule 2210(a)(4), 4512(c)

Does a firm have an obligation to inquire whether an institutional communication will be forwarded to retail investors each time that that communication is distributed?

No. Firms should have policies and procedures in place reasonably designed to prevent institutional communications from being forwarded to retail investors, and make appropriate efforts to implement those policies and procedures. Those procedures may include the use of legends warning the recipient of an

institutional communication that it is for institutional investor use only.

When a member is offering securities or other investments through another member, the inclusion of a legend would not be sufficient, in and of itself, if (for example) there is reason to believe that the other member is distributing the communication to retail investors. Absent such knowledge to the contrary, a member may reasonably rely on a legend restricting the usage of the communication to institutional investors in treating the communication as an institutional communication.

Source: FINRA Regulatory Notice 12-29 ("Notice 12-29"), found at http://finra.complinet.com/net_file_store/new_rulebooks/f/i/FINRANotice12_29.pdf; FINRA Rule 2210 Questions and Answers, Institutional Communications, Q1, found at: http://www.finra.org/industry/finra-rule-2210-questions-and-answers.

What if a firm becomes aware that an institutional communication is being forwarded by a recipient institutional investor to a retail investor?

To the extent that a firm becomes aware that a recipient institutional investor is forwarding or making available institutional communications to retail investors, the firm must treat future communications to the institutional investors as retail communications until it reasonably concludes that the improper practice has ceased.

Source: Notice 12-29

If a firm distributes or makes available a communication consisting of a reprint of an article from an independent publication, or a report published by an independent research firm, to more than 25 retail investors within a 30 calendar day period, is that communication a "retail communication"?

Yes.

If a firm uses social media or a website to communicate with investors, is that a retail communication?

Any non-password protected website or communication by means of unrestricted social media would be a retail communication. A password protected website limited to institutional investors would be an institutional communication.

Source: Notice 12-29

What is the difference between "correspondence" and "retail communications"?

The difference depends upon the number of retail investors to which the written materials are distributed or made available in a 30 calendar day period. If it is provided to 25 or fewer retail investors, the written materials are correspondence; if provided to more than 25 retail investors, the written materials are a retail communication.

Does the Rule impose any standards on the content of communications?

The communications rules include both general and specific content standards. Certain general standards apply to all communications, such as requirements that communications be fair and balanced, and provide a sound basis for evaluating the facts in regard to any particular security, industry or service, and prohibitions on omitting material facts whose absence would make the communication misleading. More particular content standards apply to specific issues or securities.

Source: Notice 12-29

Approval, Review and Recordkeeping Requirements

The Rule's approval, review and recordkeeping requirements vary depending on the type of communication. Retail communications are subject to the most stringent requirements. For example, members generally must have a registered principal approve all advertisements, sales literature and independently prepared reprints prior to use. This pre-use approval requirement does not apply to: (1) institutional sales material; (2) public appearances; or (3) correspondence, unless it is sent to 25 or more existing retail customers within a 30 calendar day period and includes an investment recommendation or promotes a product or service of the firm.

Retail Communications – Approval and Review

When must retail communications be approved by a registered principal?

Before the earlier of its first use or its filing with the FINRA Advertising Regulation Department (the "Department").

Source: Rule 2210(b)(1)(A)

Who must approve a retail communication?

An appropriately qualified registered principal of the firm must approve each retail communication. However, a Series 16 Supervisory Analyst may, however, review the following retail communications:

- Research reports on debt and equity securities;
- Retail communications as described in FINRA Rule 2241(a)(11)(A) (list of research-related communications that do not fall within the definition of "research report" under FINRA Rule 2241); and
- Other research that does not meet the definition of "research report" under FINRA Rule 2241(a)(11),[2] provided that the Supervisory Analyst has technical expertise in the particular product area.

A Series 16 Supervisory Analyst may not approve a retail communication that requires a separate registration (such as retail communications concerning options, security futures or municipal securities) unless the supervisory analyst also holds the other registrations.

[2] FINRA Rule 2241(a)(11) defines a "Research Report" as any written (including electronic) communication that includes an analysis of equity securities of individual companies or industries (other than an open-end registered investment company that is not listed or traded on an exchange), and that provides information reasonably sufficient upon which to base an investment decision. Among other communications, this term does not include communications that are limited to the following: (i) discussions of broad-based indices; (ii) commentaries on economic, political or market conditions; (iii) technical analyses concerning the demand and supply for a sector, index or industry based on trading volume and price; (iv) statistical summaries of multiple companies' financial data, including listings of current ratings; (v) recommendations regarding increasing or decreasing holdings in particular industries or sectors; or (vi) notices of ratings or price target changes, provided that the member simultaneously directs the readers of the notice to the most recent research report on the subject company that includes all current applicable disclosures required by this rule and that such research report does not contain materially misleading disclosure, including disclosures that are outdated or no longer applicable.

Source: Rule 2210(b)(1)(A), (B)

Are there any exceptions to the principal pre-use approval requirements for retail communications?

Yes, for certain previously filed retail communications. If (i) another member has filed the retail communication with the Department and has received a letter from the Department stating that it appears to be consistent with applicable standards; and (ii) the member using it in reliance upon the previous filing and approval has not materially altered it and will not use it in a manner that is inconsistent with the conditions of the Department's letter, then the retail communication does not have to be pre-approved by a principal.

Source: Rule 2210(b)(1)(C)

What types of retail communications are excepted from the principal pre-use approval requirements?

The principal pre-use approval requirements do not apply to the following categories of retail communications, provided that the member firm supervises and reviews the communications in the same manner as required under FINRA Rule 3110(b)(4):

- Any retail communication that is excepted from the definition of "research report" under FINRA Rule 2241(a)(aa)(A), unless the communication makes any financial or investment recommendation;
- Any retail communication that is posted on an online interactive electronic forum; and
- Any retail communication that does not make any financial or investment recommendation or otherwise promote a product or service of the member.

Source: Rule 2210(b)(1)(D)

What is an online interactive electronic forum?

FINRA considers chat rooms, online seminars, 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 to be online interactive electronic forums. The mere updating of a non-interactive blog (or any other firm web page) does not cause it to become an interactive electronic forum, even if the updating occurs frequently.

Source: FINRA Regulatory Notice 10-06 ("Notice 10-06"), found at http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p120779.pdf.

Are the static portions of an online interactive electronic forum subject to the principal pre-use approval requirement?

Yes. A static posting on an interactive electronic forum, such as profile, background or wall information, is deemed to be an advertisement under Rule 2210 and therefore requires prior approval. Interactive content can be copied or forwarded and posted in a static forum, thus rendering it an advertisement.

Is the portion of a member firm's website that does not provide for real-time electronic communications within any of Rule 2210's exceptions for an online interactive electronic forum?

No.

If a member files a retail communication with the Department, although the retail communication was within one of the exceptions provided by the Rule, is principal pre-use approval still required?

Yes. An appropriately qualified principal must approve **any** communication that is filed with the Department, even if a communication otherwise would come under an exception to the principal pre-use approval requirements of FINRA Rule 2210(b)(1)(A).

Source: Rule 2210(b)(1)(F)

Is there any other provision in the Rule for a member firm to avoid the principal pre-use approval requirement?

Yes. A member firm may petition FINRA for an exemption from the principal pre-use approval requirement for good cause shown. In granting an exemption, FINRA will consider whether the exemption is consistent with the purposes of the Rule, investor protection and the public interest. Exemptive relief granted under this provision will apply only to the firms that have applied for such relief.

Source: Rule 2210(b)(1)(E); Notice 12-29

Institutional Communications – Approval and Review

What approval and review requirements apply to institutional communications?

The member firm must have written procedures for review by a principal. Those procedures must be reasonably designed to ensure that institutional communications comply with applicable standards. If the procedures do not require review of all institutional communications, they must include provision for the education and training of associated persons regarding these communications. FINRA has the right to request evidence that these supervisory procedures have been implemented and carried out.

Source: Rule 2210(b)(3)

Internal communications are excepted from the definition of institutional communications; are there any requirements relating to internal communications under the Rule?

Yes. Firms still must supervise these communications, including a firm's internal communications that train or educate registered representatives. In this regard, a firm's supervisory policies and procedures concerning internal training and education materials must be reasonably designed to ensure that such materials are fair, balanced and accurate.

Source: Notice 12-29

Retail and Institutional Communications – Recordkeeping Requirements

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What recordkeeping requirements apply to retail and institutional communications?

Members must retain retail or institutional communications for three years from the date of last use. The records must include:

- A copy of the communication and the dates of first and (if applicable) last use;
- The name of any registered principal who approved the communication and the date that approval was given;

- In the case of a retail communication or institutional communication that is not approved prior to first use by a registered principal, the name of the person who prepared or distributed the communication;
- Information concerning the source of any statistical table, chart, graph or other illustration used in the communication; and
- For retail communications that rely on the exception from pre-approval for retail communications previously filed with, and approved by, the Department,[3] the name of the firm that filed the retail communication with the Department and a copy of the Department review letter.

Source: Rule 2210(b)(4)(A)

How do the recordkeeping requirements apply to a member's communications on an online interactive electronic forum, such as a blog or chat room?

The recordkeeping requirements only require retention of the records of all communications made or received by a firm or its associated persons on an online interactive electronic forum and that relate to its "business as such," even though third-party posts are not generally treated as the member firm's or its associated persons' communications under Rule 2210 (unless they are covered by the "entanglement" and "adoption" theories discussed below). If a firm's or any of its associated person's social media posting that is not considered relating to the firm's business as such (*i.e.,* personal) is replied to with a posting that does relate to the firm's business as such, then the firm must retain records of that reply.

Neither the SEC nor FINRA has specifically defined the term "business as such," although FINRA has said that "[w]hether a particular communication is related to the business of the firm depends upon the facts and circumstances."[4]

In contrast, a communication by a member firm on its or any other website that is not an online interactive electronic forum would be subject to the recordkeeping requirements, whether or not the communication relates to the firm's business as such.

Source: Notice 11-39; Securities and Exchange Act Rule 17a-4(b)

Could a third-party post on a member firm's social media site be considered a communication by the firm or any of its registered representatives?

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, to which the supervision, recordkeeping, filing or content requirements would not apply. However, under certain circumstances, third-party posts could become attributable to the firm and considered communications with the public subject to the requirements of Rule 2210.

[3] See the discussion above under "*Are there any exceptions to the principal pre-use approval requirements for retail communications?*"

[4] FINRA Regulatory Notice 11-39 ("Notice 11-39"), found at http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p124186.pdf.

- For example, 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.
- Or if, for example, after the third-party content was posted, 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.

Source: Notice 10-06

Correspondence – Recordkeeping, Supervisory and Review

What recordkeeping requirements apply to correspondence?

The FINRA rules, the Exchange Act and the applicable Exchange Act rules relating to books and records apply to correspondence. Members must preserve for a period of at least six years any correspondence for which there is no specified period under the FINRA rules or applicable Exchange Act rules. Correspondence must be preserved in a format and media that complies with Rule 17a-4 under the Exchange Act. The names of the persons who prepared outgoing correspondence and who reviewed the correspondence must be ascertainable from the retained records and these records must be readily available to FINRA, upon request.

Source: Rule 2210(b)(4)(B); NASD Rule 4511; FINRA Rule 3110.09

What are the supervisory and review requirements for correspondence?

All correspondence is subject to the supervision and review requirements of FINRA Rule 3110(b)(4), which provides, in part, that each member must establish procedures for the review and endorsement by a registered principal in writing, on an internal record, of all transactions and for the review by a registered principal of incoming and outgoing correspondence of its registered representatives. These procedures should be in writing and be designed to reasonably supervise each registered representative. The procedures should be designed to, among other things, properly identify and handle customer complaints and to ensure that customer funds and securities are handled in accordance with firm procedures.

Source: Rule 2210(b)(2)

Filing Requirements and Review Procedures

The Rule's filing requirements depend on the type of communication and whether the firm is a new member. The type of communication will affect whether there is a "pre-use" or "concurrent with use" filing requirement.

Retail Communications – Filing Requirements – Pre-Use

What types of communications are subject to the Rule's filing requirements?

Only retail communications are subject to the filing requirements. Correspondence and institutional communications are not subject to any filing requirement with FINRA.

Do any retail communications have to be filed with FINRA prior to first use?

Yes. A new FINRA member firm must file with the Department, at least 10 business days prior to its first use, any retail communication that is published or used in any electronic or other public media, including any generally accessible website, newspaper, magazine or other periodical, radio, television, telephone or audio recording, video display, signs or billboards, motion pictures, or telephone directories (other than routine listings).

Source: Rule 2210(c)(1)

On May 18, 2015, FINRA proposed amendments to Rule 2210(c)(1)(A) pursuant to which the requirement above would be changed to require a filing within 10 business days of first use and apply only to new member firms' websites and material changes to their websites.

Source: FINRA Regulatory Notice 15-16 ("Notice 15-16"), found at http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory_Notice_15-16.pdf.

When does this pre-use filing requirement for new member firms begin and end?

The period begins on the date when FINRA's Central Registration Depository shows that FINRA membership has become effective and ends one year later.

Does a new member firm have to wait for approval by the Department prior to using retail communications filed with the Department?

No; Department approval is not required once 10 business days have passed since the filing.

Are there any exceptions to this pre-use filing rule for new member firms?

Yes. Any retail communication of a new member firm that is a free writing prospectus that has been filed with the SEC under Securities Act of 1933 ("Securities Act") Rule 433(d)(1)(ii) may be filed within 10 business days of first use rather than 10 business days prior to first use. Securities Act Rule 433(d)(1)(ii) applies to broker-prepared free writing prospectuses that are used or referred to, and widely disseminated by, an underwriter or dealer.

Source: Rule 2210(c)(1)

Is there any other provision in the Rule for a new member firm to avoid the pre-use filing requirement?

Yes. A new member firm may petition FINRA for an exemption from the pre-use filing requirement for good cause shown.

Source: Rule 2210(c)(9)(A)

Does FINRA have authority to require a new member firm to file communications other than retail communications prior to their use?

Yes. If the Department determines that a member has departed from the standards of the Rule, it may require that the member file with the Department all communications (rather than just retail communications), or the portion of the member's communications that is related to any specific types or classes of securities or services, at least 10 business days prior to first use.

Source: Rule 2210(c)(9)(B)

Are there any other pre-use filing requirements?

Yes. Member firms must file the following retail communications with the Department at least 10 business days prior to first use or publication and not publish or circulate them until any changes specified by the Department have been made:

- Retail communications concerning registered investment companies (including mutual funds, exchange-traded funds, variable insurance products, closed-end funds and unit investment trusts) that include or incorporate performance rankings or performance comparisons of the investment company with other investment companies when the ranking or comparison category is not generally published or is the creation, either directly or indirectly, of the investment company, its underwriter or an affiliate (together with a copy of the data on which the ranking or comparison is based);
- Retail communications concerning security futures, with the exception of (i) retail communications concerning security futures that are submitted to another self-regulatory organization having comparable standards pertaining to those retail communications; and (ii) retail communications in which the only reference to security futures is contained in a listing of the services of a member; and
- Retail communications concerning bond mutual funds that include or incorporate bond mutual fund volatility ratings.[5, 6]

Source: Rule 2210(c)(2)(A)-(C)

Retail Communications – Filing Requirements – Concurrent With Use

Do all retail communications not subject to an exception from the filing requirement have to be filed prior to use?

No. The following must be filed with the Department within 10 business days of first use or publication ("concurrent with use"):

- Retail communications concerning[7] registered investment companies other than

[5] FINRA Rule 2213 defines a "bond mutual fund volatility rating" as a description issued by an independent third party relating to the sensitivity of the net asset value of a portfolio of an open-end management investment company that invests in debt securities to changes in market conditions and the general economy, and is based on an evaluation of objective factors, including the credit quality of the fund's individual portfolio holdings, the market price volatility of the portfolio, the fund's performance, and specific risks, such as interest rate risk, prepayment risk, and currency risk.

[6] This filing requirement relating to bond mutual funds incorporating volatility ratings is proposed to be removed under Notice 15-16.

[7] The proposed amendments to Rule 2210(c)(3)(A) would require only the filing of retail

those subject to the pre-use filing requirements;

- Retail communications concerning public direct participation programs;[8,9]
- Any template for written reports produced by, or retail communications concerning, an investment analysis tool;[10]
- Any retail communication concerning collateralized mortgage obligations registered under the Securities Act;
- Any retail communication concerning any security that is registered under the Securities Act and that is derived from or based on a single security, a basket of securities, an index, a commodity, a debt issuance or a foreign currency (that is, "registered structured products"), except (i) retail communications already subject to the pre-use filing requirements or (ii) the retail communications described in the four bullet points above.

Source: Rule 2210(c)(3)

Are any of these concurrent with use filings subject to Department approval?

No. Department approval is not required. However, the Department has historically made comments on these documents when it believed that they were not prepared in accordance with FINRA's standards.

Does the concurrent with use filing requirement for structured products apply to retail communications for structured product offerings exempt from filing under the Securities Act or offerings of structured certificates of deposit?

No. The concurrent with use filing requirement only applies to retail communications for registered structured products. Communications relating to unregistered products, such as bank notes and

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communications that "promote or recommend a specific registered investment company or family of registered investment companies." *Notice 15-16*

[8] FINRA Rule 2310 defines a "direct participation program" as "a program which provides for flow-through tax consequences regardless of the structure of the legal entity or vehicle for distribution including, but not limited to, oil and gas programs, real estate programs, agricultural programs, cattle programs, condominium securities, Subchapter S corporate offerings and all other programs of a similar nature, regardless of the industry represented by the program, or any combination thereof." A program may be composed of one or more legal entities or programs but when used herein and in any rules or regulations adopted pursuant hereto the term shall mean each of the separate entities or programs making up the overall program and/or the overall program itself. Excluded from this definition are real estate investment trusts, tax qualified pension and profit sharing plans pursuant to Sections 401 and 403(a) of the Internal Revenue Code and individual retirement plans under Section 408 of that Code, tax sheltered annuities pursuant to the provisions of Section 403(b) of the Internal Revenue Code, and any company including separate accounts, registered pursuant to the Investment Company Act."

[9] FINRA recently provided guidance relating to "Regulation A+" solicitation materials and Rule 2210. If a member firm uses Regulation A+ solicitation materials concerning a direct participation program security with more than 25 retail investors, then the materials would be subject to the concurrent with use filing requirement and subject to principal approval. *Source:* FINRA Regulatory Notice 15-32, found at: http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-15-32.pdf.

[10] FINRA Rule 2214(b) defines an "investment analysis tool" as an interactive technological tool that produces simulations and statistical analyses that present the likelihood of various investment outcomes if certain investments are made or certain investment strategies or styles are undertaken, thereby serving as an additional resource to investors in the evaluation of the potential risks and returns of investment choices. Under Notice 15-16, this filing requirement would be removed.

certificates of deposit, are not subject to the filing requirements.

Does the filing (whether pre-use or concurrent with use) of a draft story board of a television or video retail communication satisfy that filing requirement?

No. The final "filmed" version must be filed with the Department within 10 business days of first use or broadcast.

Source: Rule 2210(c)(4)

Are there any retail or other communications by a member firm that are not subject to the filing requirements?

Yes; the following communications do not have to be filed with the Department:

- Retail communications that previously have been filed with the Department and that are to be used without material change;
- Retail communications that are based on templates that were previously filed with the Department the changes to which are limited to updates of more recent statistical or other non-narrative information;[11]
- Retail communications that do not make any financial or investment recommendation or otherwise promote a product or service of the member;
- Retail communications that do no more than identify a national securities exchange symbol of the member or identify a security for which the member is a registered market maker;
- Retail communications that do no more than identify the member or offer a specific security at a stated price;
- Prospectuses, preliminary prospectuses, fund profiles, offering circulars and similar documents that have been filed with the SEC or any state, or that are exempt from such registration,[12] and free writing prospectuses that are exempt from filing with the SEC, except that an investment company prospectus published under Securities Act Rule 482 and a free writing prospectus that is required to be filed with the SEC under Securities Act Rule 433(d)(1)(ii) will not be considered a prospectus for purposes of this exclusion;[13]
- Retail communications prepared in accordance with Section 2(a)(10)(b) of the Securities Act (tombstones), or any rule thereunder, such as Rule 134, and announcements as a matter of record that a member has participated in a private placement, unless the retail communications are related to publicly offered direct participation programs or securities issued by registered investment companies;
- Press releases that are made available only to members of the media;

[11] The proposed amendments to Rule 2210(c)(7)(B) would expand this exclusion for previously filed templates to include non-predictive narrative descriptions of market events during the period covered by the communication and factual descriptions of portfolio changes. *Notice 15-16*

[12] The proposed amendments to Rule 2210(c)(7)(F) would expand the filing exclusion to cover annual or semi-annual shareholder reports. *Notice 15-16*

[13] Preliminary or summary "term sheets," which do not contain final pricing information and are free writing prospectuses that are exempt from filing with the SEC under Rule 433(d)(5)(i), are not subject to the filing requirements of Rule 2210(c)(1) – (4).

- Any reprint or excerpt of any article or report issued by a publisher (a "reprint"), provided that:
    - The publisher is not an affiliate of the member using the reprint or any underwriter or issuer of a security mentioned in the reprint that the member is promoting;
    - Neither the member using the reprint nor any underwriter or issuer of a security mentioned in the reprint has commissioned the reprinted article or report; and
    - The member using the reprint has not materially altered its contents except as necessary to make the reprint consistent with applicable regulatory standards or to correct factual errors;
- Correspondence;
- Institutional communications;
- Communications that refer to types of investments solely as part of a listing of products or services offered by the member;
- Retail communications that are posted on an online interactive electronic forum;
- Press releases issued by closed-end investment companies that are listed on the New York Stock Exchange (the "NYSE") under Section 202.06 of the NYSE Listed Company Manual (or any successor provision); and
- Research reports (as defined in FINRA Rule 2241) that concern only securities that are listed on a national securities exchange, other than research reports required to be filed with the SEC pursuant to Section 24(b) of the Investment Company Act.

Note that press releases, reprints, correspondence and institutional communications, although exempt from the Department's filing requirements, are deemed filed with FINRA for purposes of Section 24(b) of the Investment Company Act of 1940 and Rule 24b-3 thereunder.

Source: Rule 2210(c)(7)

Are there any circumstances under which FINRA would require a filing of a retail communication posted on an online interactive electronic forum?

Yes. FINRA has advised that if the purpose of the forum is, for example, to sell securities or promote a particular mutual fund, then the filing requirements would apply.[14]

Can a member firm petition FINRA for an exemption from the concurrent with use filing requirements?

Yes. Upon request and in accordance with the FINRA 9600 procedural rules, FINRA may conditionally or unconditionally grant an exemption from the concurrent with use filing rules for good cause shown after taking into consideration all relevant factors, to the extent such exemption is consistent with the purposes of the Rule, the protection of investors and the public interest.

Source: Rule 2210(c)(9)(B)

[14] *See* Notice 10-06, Q4 ("The treatment of a blog under Rule 2210 depends on the manner and purposes for which the blog has been constructed.").

Are speaking engagements subject to pre-use approval or any filing requirements?

No. However, firms are required to establish appropriate written policies and procedures to supervise public appearances by associated persons.

Content Standards

The Rule imposes general content standards applicable to all communications and more specific standards that vary, depending on the nature of the communication.

What are the general content standards applicable to all communications?

The Rule's general content standards are:

- All member communications must be based on principles of fair dealing and good faith, must be fair and balanced, and must provide a sound basis for evaluating the facts in regard to any particular security or type of security, industry, or service. No member may omit any material fact or qualification if the omission, in light of the context of the material presented, would cause the communications to be misleading.
- No member may make any false, exaggerated, unwarranted, promissory or misleading statement or claim in any communication. No member may publish, circulate or distribute any communication that the member knows or has reason to know contains any untrue statement of a material fact or is otherwise false or misleading.
- Information may be placed in a legend or footnote only if that placement would not inhibit an investor's understanding of the communication.
- Members must ensure that statements are clear and not misleading within the context in which they are made, and that they provide balanced treatment of risks and potential benefits. Communications must be consistent with the risks of fluctuating prices and the uncertainty of dividends, rates of return and yield inherent to investments.
- Members must consider the nature of the audience to which the communication will be directed and must provide details and explanations appropriate to the audience.
- Communications may not predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast; provided, however, that this provision does not prohibit:
    - A hypothetical illustration of mathematical principles, provided that it does not predict or project the performance of an investment or investment strategy;
    - An investment analysis tool, or a written report produced by an investment analysis tool, that meets the requirements of FINRA Rule 2214; and
    - A price target contained in a research report on debt or equity securities, provided that the price target has a reasonable basis, the report discloses the valuation methods used to determine the price target, and the price target is

accompanied by disclosure concerning the risks that may impede achievement of the price target.

Source: Rule 2210(d)(1)

May a member firm use comparisons in any communications?

Yes, provided that any comparison between investments or services in retail communications must disclose all material differences between them, including (as applicable) investment objectives, costs and expenses, liquidity, safety, guarantees or insurance, fluctuation of principal or return, and tax features.

Source: Rule 2210(d)(2)

May a member firm use backtested, or hypothetical historical, information in communications?

FINRA has provided guidance on backtested data included in institutional communications relating to exchange-traded products.[15] FINRA's approval of the use of backtested data in these materials is limited to a narrow set of circumstances. In its guidance, FINRA reiterated its historic position that the presentation of backtested data to retail investors does not comply with its disclosure standards. FINRA also warned that the backtested data should not be given excess weight in a recommendation to an investor.

In discussions with counsel, FINRA reiterated its position against the use of backtested data in retail communications relating to structured products (not just exchange-traded products). In institutional communications relating to structured products, FINRA indicated that its application of the content standards of Rule 2210(d) to backtested data would not be applicable in the same manner as to retail communications. Consequently, the use of backtested data may be appropriate in institutional communications relating to structured products, at the discretion of the broker-dealer.

Does the Rule require any particular information in communications?

Yes, all retail communications and correspondence must:

- Prominently disclose the name of the member, or the name under which the member's broker-dealer business primarily is conducted as disclosed on the member's Form BD, and may also include a fictional name by which the member is commonly recognized or which is required by any state or jurisdiction;
- Reflect any relationship between the member and any non-member or individual who is also named; and
- If it includes other names, reflect which products or services are being offered by the member.

These requirements do not apply to so-called "blind" advertisements used to recruit personnel.

Source: Rule 2210(d)(3)

Are the content standards applicable to advertisements by investment companies?

Yes. Retail communications and correspondence that present the performance of a non-money market

[15] The FINRA guidance is available at http://www.finra.org/Industry/Regulation/Guidance/InterpretiveLetters/P246651.

mutual fund must disclose the fund's maximum sales charge and operating expense ratio as set forth in the fund's current prospectus fee table.

Source: Rule 2210(d)(5)

Are the content standards applicable to a FINRA member's proprietary index?

Yes. The publication by a FINRA member of its proprietary index while the member knew or had reason to know that the index contained materially inaccurate information was a violation of Rule 2210(d)(1)(B).

Source: FINRA Letter of Acceptance, Waiver and Consent No. 2014042781801

Are there content requirements for discussions of tax implications?

Yes, there are general and very specific content standards for tax considerations in communications.

In retail communications and correspondence, references to tax-free or tax-exempt income must indicate which income taxes apply, or which do not, unless income is free from all applicable taxes. If income from an investment company investing in municipal bonds is subject to state or local income taxes, this fact must be stated, or the illustration must otherwise make it clear that income is free only from federal income tax.

Communications may not characterize income or investment returns as tax-free or exempt from income tax when tax liability is merely postponed or deferred, such as when taxes are payable upon redemption.

Any comparative illustration of the mathematical principles of tax-deferred versus taxable compounding must meet specific requirements set forth in the Rule.

Source: Rule 2210(d)(4)

What requirements apply to testimonials?

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 following:

- The fact that the testimonial may not be representative of the experience of other customers;
- The fact that the testimonial is no guarantee of future performance or success; and
- If more than $100 in value is paid for the testimonial, the fact that it is a paid testimonial.

Source: Rule 2210(d)(6)

Recommendations – Content Standards

What are the limitations on including a recommendation in a communication?

All retail communications that include a recommendation of securities must have a reasonable basis for the recommendation.

In any communication, a member must provide, or offer to furnish upon request, available investment information supporting the recommendation. When a member recommends a corporate equity security, the

member must provide the price at the time the recommendation is made.

Source: Rule 2210(d)(7)(A), (B)

What information must be included in a communication including a recommendation?

All retail communications that include a recommendation of securities must disclose the following **conflicts of interest**, to the extent applicable:

- That at the time the communication was published or distributed, the member was making a market in the security being recommended, or in the underlying security if the recommended security is an option or security future, or that the member or associated persons will sell to or buy from customers on a principal basis;
- That the member or any associated person that is directly and materially involved in the preparation of the content of the communication has a financial interest in any of the securities of the issuer whose securities are recommended, and the nature of the financial interest (including, without limitation, whether it consists of any option, right, warrant, future, long or short position), unless the extent of the financial interest is nominal; and
- That the member was manager or co-manager of a public offering of any securities of the issuer whose securities are recommended within the past 12 months.

Source: Rule 2210(d)(7)(A)(i)-(iii)

Can a retail communication refer to past, specific recommendations?

No. A retail communication or correspondence may not refer, directly or indirectly, to past specific recommendations of the member that were or would have been profitable to any person.

A retail communication or correspondence is, however, allowed to set out or offer to furnish a list of all recommendations as to the same type, kind, grade or classification of securities made by the firm within the immediately preceding period of not less than one year. The list must provide certain information regarding each recommended security and include a prescribed cautionary legend warning investors not to assume that future recommendations will be profitable.

Source: Rule 2210(d)(7)(C)

Do these content standards apply to prospectuses filed with the SEC?

Prospectuses, preliminary prospectuses, fund profiles and similar documents that have been filed with the SEC and free writing prospectuses that are exempt from filing with the SEC are not subject to the content standards of FINRA Rule 2210(d);[16] however, these standards do apply to investment company "omitting prospectuses" published under Securities Act Rule 482 and dealer-prepared, widely disseminated free writing prospectuses that are required to be filed with the SEC under Securities Act Rule 433(d)(1)(ii).

Source: Rule 2210(d)(8)

Can a firm become responsible for the content of a third party's website?

[16] *See* footnote 13.

If a member firm co-brands any part of a third-party website, such as by placing the firm's logo prominently on the site, then, under an adoption theory, it is responsible for the content of the entire site.

Source: Notice 11-39

Speaking Engagements/Public Appearances – Content Standards

Are speaking engagements subject to the content requirements?

Yes, if the speaking engagement constitutes a "public appearance." Rule 2210(f) defines a public appearance as "speaking activities that are unscripted and do not constitute retail communications, institutional communications or correspondence." Public appearances are viewed by FINRA as part of the broader term "communications with the public." Consequently, they are subject to the general content standards for communications (*i.e.*, that they be fair and balanced and not include false or misleading statements). Scripts, slides, handouts or other written (including electronic) materials used in connection with public appearances are considered communications for purposes of the Rule and, as a result, can be retail communications.

Source: Notice 12-29; Rule 2210(f)(1)

Is there anything specific that the Rule requires to be included in public appearances?

Yes. For public appearances by associated persons, if an associated person recommends a security in a public appearance, the associated person must have a reasonable basis for the recommendation. The associated person also must disclose, as applicable, the following conflicts of interest:

- That the associated person has a financial interest in any of the securities of the issuer whose securities are recommended, and the nature of the financial interest, unless the extent of the financial interest is nominal; and
- Any other actual, material conflict of interest of the associated person or firm of which the associated person knows or has reason to know at the time of the public appearance.

Source: Rule 2210(f)2)

Are there any exceptions to these public appearance disclosure requirements by associated persons?

Yes. These disclosure requirements do not apply to a public appearance by a research analyst for purposes of FINRA Rule 2241[17] that includes all of the applicable disclosures required by that rule. The disclosure requirements also do not apply to a recommendation of investment company securities or variable insurance products, provided that the associated person must have a reasonable basis for the recommendation.

Source: Rule 2210(g)

Is participation in an online interactive electronic forum a public appearance?

[17] FINRA Rule 2241(a)(8) defines a "research analyst" as an associated person "who is primarily responsible for, and any associated person who reports directly or indirectly to such a research analyst in connection with, preparation of the substance of a research report, whether or not any such person has the job title of 'research analyst.'"

Unscripted participation in an online interactive electronic forum such as a chat room or an online seminar is a "public appearance."

Please see Annex A for a summary chart of Rule 2210.

By Bradley Berman, Of Counsel,
Morrison & Foerster LLP

Annex A

FINRA COMMUNICATIONS RULES (SUMMARY)

Type of Communication	Principal Pre-Use Approval	FINRA Filing	Record-Keeping
Institutional Communication[1]	Written procedures must address education, training regarding communications	Not required to be filed	Three years from date of last use. Keep on file: name of preparer, copy of communication, source of statistical information or illustration, date of first and last use, and if principal did review, then name and date of approval
Retail communication[2]	Requires approval before earlier of: use or filing with FINRA. Principal registration of approver will depend on type of material Exceptions: Pre-approval is not required for:	For new members, 10 business days prior to first use: any retail communication published or used broadly. FWPs filed with SEC may be filed within 10 days of first use[3] Within 10 business days of first use or publication: template for written	Three years from date of last use. File must include: (1) copy of communication, (2) date of first use, (3) date of last use, (4) name of principal who approved, (5) date approval received, (6) if pre-approval not required because another firm filed it, name of firm and their FINRA review letter, (7) source of any

[1] Institutional communication:
- written/electronic communications distributed or made available only to institutional investors
- does not include internal communications
- if member has "reason to believe" communication will be forwarded to retail investors, communication may be a "retail communication"

[2] Retail communication:
- any written/electronic communication distributed or made available to more than 25 retail investors within a 30-day period
- generally includes advertisements, sales literature, reprints
- sales scripts intended for use with retail customers

[3] To be removed by proposed amendments.

FINRA COMMUNICATIONS RULES (SUMMARY)

Type of Communication	Principal Pre-Use Approval	FINRA Filing	Record-Keeping
	Previously Filed Materials: (1) another firm filed it with FINRA and has received a review letter from FINRA, and (2) firm using it has not made material changes and will not use in a manner inconsistent with the FINRA letter;	reports re an investment analysis tool, a communication concerning an SEC-registered structured product,[4] a TV or video segment	statistical information or illustration
	Communications excluded from research report definition and that do not include any investment recommendation; *Materials posted in an online forum;* and *Any other communication that does not include an investment recommendation*	Exceptions to Filing Requirement: (1) communications previously filed, to be used without material change (2) communications based on template previously filed (that will include updated statistical or changes to non-narrative info) (3) materials that do not include a recommendation or promote a product (4) communications that only identify an exchange symbol	

[4] Rule 2210(c)(3)(E) includes retail communications concerning any SEC-registered security derived from or based on a single security, a basket of securities, an index, a commodity, a debt issuance or a currency.

FINRA COMMUNICATIONS RULES (SUMMARY)

Type of Communication	Principal Pre-Use Approval	FINRA Filing	Record-Keeping
		or a security for which the member is a market maker or offer a specific security at a price	
		(5) a prospectus or preliminary prospectus filed with SEC,[5] or exempt from registration, EXCEPT that an FWP filed with the SEC under Rule 433(d)(1)(ii) is not considered a prospectus[6]	
		(6) communications prepared in accordance with Securities Act Sec. 2(a)(10)(b), such as Rule 134 notices	
		(7) press releases available only to media	
		(8) reprints of published articles provided (a) member is not affiliated with publisher, (b) member or issuer or	

[5] The proposed amendments would add annual and semi-annual shareholder reports.

[6] FWPs filed by an underwriter under Rule 433(d)(1)(ii) in a manner that will result in broad unrestricted distribution must be filed with FINRA, such as brochures posted on a public website, publicly available website pages about structured products.

FINRA COMMUNICATIONS RULES (SUMMARY)

Type of Communication	Principal Pre-Use Approval	FINRA Filing	Record-Keeping
		underwriter of any security mentioned has not commissioned, (c) member hasn't altered contents (9) correspondence (10) institutional communications (11) material posted on online forum (12) research reports that concern only listed securities	
Correspondence[7]	Firm shall establish reasonable supervisory review process as required by Rule 3110.	Not required to be filed	Record retention requirements set out in Rule 3110.

[7] Correspondence: any written/electronic communication distributed or made available to 25 or fewer retail investors within a 30-day period.

SUMMARY

SUBJECT TO FILING:

- FWPs that are red herrings (filed under Rule 433(d)(1)(ii) if distributed broadly, on an unrestricted basis ("underwriter FWPs"))
- If used broadly or on an unrestricted site:
    - a brochure
    - a product description
    - website product discussions

NOT SUBJECT TO FILING:

- Preliminary Pricing Supplements (424(b) filings)
- Final Pricing Supplements (424(b) filings)
- Offering documents for certificates of deposit, bank notes, or 144A issuances
- FWPs that are final term sheets, filed with the SEC
- FWPs that are exempt from the SEC's filing requirements, such as preliminary or summary "term sheets" that do not contain final pricing information and are free writing prospectuses under Rule 433(d)(5)(i)

FREQUENTLY ASKED QUESTIONS ABOUT LIABILITY OF PUBLIC COMPANIES AND COMPANIES IN REGISTRATION FOR WEBSITE AND SOCIAL MEDIA CONTENT

Understanding a Company's Potential Liability under the Securities Laws for Website Content

These FAQs address the ways in which company websites and social media platforms can give rise to securities law liability, and how companies can protect themselves by instituting comprehensive policies and procedures. The Securities and Exchange Commission (the "SEC") has acknowledged the role of company websites and social media platforms, such as Twitter, Facebook and YouTube (as well as their many competitors) (collectively, "social media"), in communicating with investors (*e.g.*, for purposes of addressing Regulation Fair Disclosure, or "Regulation FD"). When we refer to "web content" herein, we are referring to the company's website, as well as any content the company publishes via social media. These FAQs do not address the special concerns applicable to registered broker-dealers or registered investment advisers in their use of social media.

When may a company be liable under the securities laws for the contents of a particular website or social media posting?

A company may, in certain cases, be liable for material misstatements in, or omissions from, its web content if investors rely upon such information in making an investment decision regarding the company's securities. Companies also may be liable for web content under Regulation FD if the content contains material information that is available to analysts and other similar market participants and the website or social media channel is not deemed "public" for Regulation FD purposes. A public company is exposed to such liability when the website (or social media site) is established. Many public companies implement policies that impose an internal corporate approval process before web content is published or modified as part of their corporate communications policy or as part of their general Regulation FD policy, as well as to manage their exposure to liability. Issues may arise when business units create web content without the approval of their company's senior management or outside of a corporate policy. A company's general

counsel should monitor web content created by business units.

More problematic is web content created by an employee without the authorization of his employer that displays the company's name, logo and/or other marks. It is likely that such companies will have redress against such an employee for trademark infringement, contract violations and other claims, but companies are subject to the risk of being found liable under the securities laws to third parties who reasonably believed that the content was owned or authorized by the company and relied on such information in making their investment decisions regarding the company.

What other legal risks is a company exposed to in connection with its web content?

In addition to potential liabilities under the securities laws, there are numerous types of potential risks, many of which are state law actions, including:

- defamation or libel;
- trade secrets;
- stock manipulation;
- breach of fiduciary duty;
- breach of contract; and
- copyright or trademark infringement.

Is a company exposed to securities law liability for all of the content on its website or social media platforms?

Not likely, but a company may be surprised to find that it has securities law liability for web content that is not necessarily investor-oriented. A company's web content should be scrutinized just as carefully as communications made in traditional off-line media. In an interpretive release entitled "Use of Electronic Media," (SEC Release No. 33-7856 (May 4, 2000), the SEC stated (*see* footnote 11) that liability under the federal securities laws is applied equally to electronic and paper-based media. This interpretative release is referred to herein as the "May 2000 Release."

According to the SEC in the May 2000 Release (*see* Section II(B)(1)), a company may be subject to the antifraud provisions of the federal securities laws for any page on its website if the page "reasonably could be expected to reach investors or the securities markets regardless of the medium through which the statements are made, including the Internet." Depending on the circumstances, it is possible that a social media posting could satisfy this standard as well and therefore be subject to the antifraud provisions.

A company should assume that all or substantially all of its web content may expose it to liability under the securities laws. Material misstatements or omissions in web content may be violations of Rule 10b-5 under the Securities Exchange Act of 1934 (the "Exchange Act"). In addition, as the definition of the term "offer" in Section 2(a) of the Securities Act of 1933 (the "Securities Act") is interpreted broadly, many web pages, including web pages intended to serve market or promotional functions, might be considered to contain an offer under the Securities Act. However, it is likely that a court would more closely scrutinize the content on the investor relations pages of a website than other web content because investors are more likely to rely on that content in making investment decisions. Nevertheless, SEC guidance does not distinguish between investor relations pages and other website pages in this context.

Source: Examples of cases that held that misleading product and service information can be the basis for Rule 10b-5 liability include *In re Apple Computer Sec.*

Litig., 886 F.2d 1109 (9th Cir. 1989) and *In re Carter-Wallace Sec. Litig.* 150 F.3d 153 (2d Cir. 1988).

Can a company use marketing information for its products and services in its web content without being exposed to securities law liability?

Probably, as long as the marketing information is not misleading. However, it is likely that a company will be subject to antifraud liability for the marketing information. *See "Is a company exposed to securities law liability for all of the content on its website or social media platforms?"*

A company's marketing department may aggressively use the company's website or social media platforms to promote the company's products and services. Product and service descriptions do not need to be bland, but shouldn't be untrue or wildly exaggerated. Courts may uphold traditional promotional content as allowable "puffery," but a company should ensure that this information is not misleading or untrue.

If a company is conducting an offering, it should ensure that the marketing or promotional web content is consistent with the type of marketing efforts engaged in by the company in the past (and, perhaps, ensure that the pages do not link to third-party marketing content or, if they do, ensure that appropriate disclaimers are in place). Promotional materials should be designed to arouse interest in the company's products or services.

As a precaution, companies should use disclaimers or legends to attempt to shield themselves from securities law liability for marketing or promotional information or materials. Preferably, such disclaimers or legends should appear on each web page containing marketing or promotional content. To the extent applicable, such disclaimers or legends should state that the content was provided by a third party. However, the SEC has made it clear that disclaimers do not necessarily insulate a company from liability. *See* the May 2000 Release, footnote 61 and the related text.

Source: Courts have found puffery relating to a company's products and services non-actionable under the securities laws in many instances. *See In re Stratosphere Corp. Sec. Litig.*, 1998 Lexis 4759 (D. Nev. April 7, 1998). Cases that held misleading product and service information to be the basis for Rule 10b-5 liability include *Warshaw v. Xoma*, 74 F.3d 955 (9th Cir. 1996); *In re Apple Computer Sec. Litig.*, 886 F.2d 1109 (9th Cir. 1989); and *In re Carter-Wallace Sec. Litig.*, 150 F.3d 153 (2d Cir. 1988).

Is a company liable for web content provided by a third party?

It can be. The SEC stated clearly in the May 2000 Release that companies (and other market participants) can be liable under Section 10(b) and Rule 10b-5 for third-party information under certain circumstances. A company may be liable for third-party information that is hyperlinked from the company's website under the "entanglement" or "adoption" theories. Under the entanglement theory, third-party information may be attributed to a company depending on the level of pre-publication involvement by the company in the preparation of the information. Under the adoption theory, third-party information may be attributed to a company if the company explicitly or implicitly endorses or approves the information. The SEC repeated its guidance regarding hyperlinked information in an interpretive release entitled "Commission Guidance on the Use of Company Websites," which was published by the SEC on August

1, 2008 (SEC Release No. 34-58288 (August 1, 2008)). This interpretive release is referred to herein as the "August 2008 Release." Increased caution is necessary with respect to "framed" third-party contact. Framing occurs when a web page becomes accessible within the four corners of another web site, the host website. Framed content increases the potential for investor confusion because the website user may not recognize that the framed content is not the content of the host website. Even if the website user is aware that he or she is accessing framed content, it is not unreasonable for the investor to think that the framed website is affiliated with the host website. In either case, the risk is that the company will be deemed to have adopted the framed content and, accordingly, be potentially liable for any material misstatements or omissions therein. *See* the May 2000 Release.

According to the August 2008 Release, third-party information may be attributed to a company if the company involved itself in the preparation of the information or explicitly or implicitly endorsed or approved the third-party information. In determining whether a company has adopted third-party information that is hyperlinked to its website, the SEC will consider the following factors, among others:

- context of the hyperlink;
- risk of confusing investors; and
- presentation of the hyperlinked information.

In general, the SEC will assume that a company has posted a hyperlink because it believes the linked information will be of interest to the users of its website (*see* Section II(B)(2) of the May 2000 Release)

. Accordingly, companies are advised to provide written disclosure explaining why they are providing the hyperlink. Such disclosure may serve to make it clear to the user of the website that the company is not adopting the hyperlinked information. Companies also should consider other methods to explain the usage of hyperlinked information, such as "exit notices" or "intermediate screens." The exit notices or intermediate screens should contain language that informs the website user that it is leaving the company's website and is entering into a third-party site, that the content on the third-party site is the responsibility of the third party, not that of the company, and that the company disclaims liability for the linked content.

The risk of liability under the securities laws may be allocated contractually if there is an agreement governing the provision of the information. For example, a company can impose an indemnification obligation on the third party that created the content. However, indemnification may not provide sufficient protection, if at all, for such potential liability. *See "Can a company be liable for a third-party link even if it is silent about the third-party information?"*

An important exception to the foregoing relates to a company that is engaged in a securities distribution. There is a strong inference that a company that is engaged in a securities distribution has adopted the hyperlinked information on its website if such information meets the definition of "offer to sell," "offer for sale" or "offer" under Section 2 of the Securities Act, and, accordingly, a company is subject to liability therefor under the federal securities laws. Presumably, this strong inference extends to other social media platforms as well. For other qualifications relating to offering materials, *see "Can a company link from offering materials on its website to third-party content?"*

As a precaution, companies should use disclaimers or legends to attempt to shield themselves from securities law liability for marketing or promotional information or materials. Preferably, such disclaimers or legends should appear on each web page containing marketing or promotional content, and, to the extent applicable, such disclaimers or legends should state that the content was provided by a third party. However, the SEC has made it clear that disclaimers do not necessarily insulate a company from liability; if the facts and circumstances indicate that the company has adopted the information, the company will remain exposed to liability notwithstanding the use of a legend.

Note that in the May 2000 Release, footnotes 53-55 and the accompanying text, the SEC addresses the application of the "adoption" theory, but not the "entanglement" theory, to linked information on third-party websites.

Source: The SEC addressed these issues in Section II(B) of the May 2000 Release and in Section II(B)(2) of the August 2008 Release.

May a company be indemnified for liabilities that arise from third-party web content?

Yes, but not always. Congress and the SEC have had long-standing policy objections regarding specific disclaimers in respect of antifraud liability, including a position that indemnification of such liability is contrary to the federal securities laws and public policy. In fact, companies are required to provide an undertaking regarding the SEC's position regarding indemnification when they file a registration statement, and certain registration statements require the registrant to include an acknowledgment of the position. *See* Item 510 of Regulation S-K and the undertaking set forth in Item 512(h) of Regulation S-K.

What is the SEC's analytical framework to determine if companies are liable for third-party hyperlinked content?

In the August 2008 Release, the SEC provides a non-exhaustive list of factors that influence the analysis of whether a company has "adopted" hyperlinked materials. The non-exclusive factors include:

- context of the hyperlink – what the company says about the hyperlink or what is implied by the context in which the company places the hyperlink;
- risk of confusing investors – the presence or absence of precautions against investor confusion about the source of the information; and
- presentation of the hyperlinked information – how the hyperlink is presented graphically on the website, including the layout of the screen containing the hyperlink.

Source: The SEC's link framework was originally discussed in Section II(B) of the May 2000 Release and was restated by the SEC in Section II(B)(2) of the August 2008 Release.

How do a company's statements about a third party render the third-party content attributable to the company?

If a company expressly or implicitly approves, endorses or supports third-party content, the content is likely to be considered attributable to the company. In addition, subtler statements also may lead to attribution. This is commonly referred to as the adoption theory.

Accordingly, a company must be careful about what it says about third-party content.

The SEC has provided examples of statements that indicate that a company is endorsing hyperlinked information, such as - "XYZ's website contains the best description of our business that is currently available," An example of a company supporting hyperlinked information may involve the hyperlink being accompanied by a statement such as the following: "As reported in Today's Widget, our company is the leading producer of widgets worldwide." *See* Section II(B)(1)(a) of SEC Release No. 33-7856 (May 4, 2000).

Source: The examples are in Section II(B)(1)(a) of the May 2000 Release. *See also In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410 (3d Cir. 1997), in which a company was found to adopt and endorse an analyst's projections by stating at a securities analysts' conference that it was "comfortable" with analyst's earnings forecasts within a certain range. The *Burlington* case may be contrasted with *Malone v. Microdyne Corp.*, 26 F.3d 471 (4th Cir. 1994) in which the chairman/president of a company stated that he was comfortable with an analyst's earnings estimate for his company and the court held that the statement was not actionable. *See also* Section II(B)(2) of the August 2008 Release.

Can a company be liable for a third-party link even if it is silent about the third-party information?

Yes. The context of a third-party link on a company's website may imply that the linked content is attributable to the company. In the May 2000 Release, the SEC notes that in situations where a wealth of information is available regarding a particular matter, but the material accessible by hyperlinks on a company's website is not representative of the available information, the accessibility of the hyperlink may be deemed an endorsement by the company of the hyperlinked information. Another example provided in the release involves selectively establishing and terminating hyperlinks to a third-party website depending on the nature of the information about the company on a particular website or websites. Such conduct may be viewed as an attempt to control the flow of information to investors. In both of these examples, by being selective regarding the hyperlinks, a company may be found to adopt the hyperlinked information. In the August 2008 Release, the SEC provided an example of a company that posted on its website a hyperlink to a news article that was highly laudatory of the company's management. Absent explanatory language to the contrary, the SEC warns that there may be an inference that the company is commenting on, or even approving the accuracy of, the news article, or that the company was involved in its preparation. Further, if, for example, a company posts a link to only one of a number of analysts' reports, especially if it is the only analyst report that is positive, then, absent other efforts, it may be inferred that the company has approved or endorsed the report, and, hence, the company may be found liable for the contents of the report. Lastly, any attempt by a company to distinguish a particular hyperlink from other hyperlinks on its website may be deemed to be the adoption or endorsement of the linked content. Companies should avoid distinguishing one hyperlink from others, and all hyperlinks on a website should have the same prominence, color, size and, if practical, location.

Source: The SEC specifically noted this in Section II(B)(1)(c) of the May 2000 Release. *See also* Section II(B)(2) of the August 2008 Release.

For social media platforms like Facebook and Twitter, this analysis is more complex. A company doesn't have a static website on which it can share many hyperlinks, with equal prominence and at the same time. It has a "feed" or a "timeline" that is constantly updating and, by its nature, ranks some items as more prominent (because they are more current) than others. Companies must therefore be even more diligent in sharing third-party information via social media so they are not accused of selective linking to positive information about the company. *See also "May a company be selective regarding the information to which it hyperlinks from its web content?"*

May a company be selective regarding the information to which it hyperlinks from its web content?

Yes, but it will increase the company's potential exposure to liability under the securities laws. Selective linking is a circumstance that the SEC advises companies to consider in their analysis of whether a company should be liable for third-party content and may be used against a company in this context. According to SEC guidance, the degree to which a company is making a selective choice to hyperlink to a specific piece of third-party information may be indicative of the company's view or opinion of the linked information. For example, if a company selects only a small portion of information on a particular subject for which there is a wealth of information, the SEC may deem such link to be an endorsement of the hyperlinked information. In addition, if a company selectively links, or terminates links, based on the nature of the information contained in the hyperlinked websites, the SEC may deem such conduct to be an attempt to control the flow of information that is available to investors and, accordingly, the adoption by the company of such information. *See "What is the SEC's analytical framework to determine if companies are liable for third-party hyperlinked content?" See also "Can a company be liable for a third-party link even if it is silent about the third-party information?"* and *"Should a company list which analysts cover it on its website?"*

Source: The SEC's selective linking discussion is contained in Section II(B)(1)(c) of the May 2000 Release. *See also* the August 2008 Release.

How does the "envelope theory" apply to links in the SEC's link framework?

In an interpretive release entitled "Use of Electronic Media for Delivery Purposes," which release is referred to herein as the "1995 Release," the SEC provided guidance regarding a company's ability to post documents on a website to satisfy the delivery requirements of the Securities Act. With some exceptions, under the federal securities laws, in a registered offering, sales literature may not be delivered to a proposed investor unless the applicable registration statement has been declared effective and a prospectus accompanies or precedes the sales literature. According to the guidance set forth in the 1995 Release, documents that are located in close proximity to each other on a website are considered to be delivered together. In addition, documents that are hyperlinked to each other are considered to be delivered together as if hard copies of the same documents were contained in the same envelope. The premises underlying the foregoing are commonly referred to as the "envelope theory." The

1995 Release provides the following examples to explain the envelope theory:

- If a company that is engaged in a distribution posts a final prospectus on a website, supplemental sales literature may be posted on the same website as long as the final prospectus remains posted for the entire period that delivery is required. The sales literature and the final prospectus must be accessible from the same menu (or the "buttons" that a user must click to access the documents must be in close proximity to each other), be clearly identified and appear in close proximity to each other. In this example, since the documents are accessible from the same menu (or if the "buttons" a user clicks to access them are in close proximity to each other), they are deemed to be delivered together. A company relying on this example to deliver sales literature should ensure that the methods of accessing the final prospectus and the sales literature are posted in close proximity to each other and that the final prospectus is not buried in the website. Note though that the sales literature may be accessed before the final prospectus is viewed or downloaded. *See* the 1995 Release, example 14.

- A company that is engaged in a distribution may post sales literature anywhere on a website (for example, in a discussion forum), if the literature contains a hyperlink to the company's final prospectus. As long as a reader that accesses the sales literature can click a button marked "final prospectus" and be hyperlinked to the company's final prospectus, the sales literature is deemed to have been delivered with the final prospectus. *See* the 1995 Release, example 15.

- During the waiting period, a company engaged in a distribution posts a copy of a preliminary prospectus on its website, and its website contains a hyperlink to a research report published by a brokerage firm. The accessibility of the research report is deemed to be an offer in violation of Section 5(b) of the Securities Act. *See* the 1995 Release, example 16.

The envelope theory provides that all content on a website is deemed to be delivered with a prospectus that appears on a website. Information on a website is only deemed part of a Section 10 prospectus if the company that maintains the website (or someone on its behalf), acts in a manner that makes the information part of the prospectus. *See* "Website Content During Registration."

Source: The SEC confirmed that the "envelope theory" is alive and well in just the delivery context in Section II(A)(4) of the May 2000 Release and that examples 14, 15 and 16 from the 1995 Release are still good precedents for electronic delivery. It is worth noting that a company that is in registration must still search its website(s) for impermissible free writing. Even if content is not deemed part of a posted prospectus, it may still be impermissible free writing.

Can a company link from offering materials on its website to third-party content?

Yes, but it increases the company's potential liability. In addition to the general guidance regarding third-party content set forth in these FAQs, according to the SEC, if

a company includes a hyperlink within a Section 10 prospectus, or any other document required to be filed or delivered under the federal securities laws, the linked content becomes part of the prospectus or other document. Accordingly, rarely, if ever, should a company include a hyperlink in offering materials.

If third-party materials become part of a company's prospectus, the company will have liability under the securities laws for such materials and will have to file and/or deliver the linked content (depending on whether the offering materials that contain the link need to be filed or delivered). This also raises other issues, such as whether the third party needs to consent to have its content filed or delivered, as well as if the materials constitute an impermissible prospectus under the securities laws.

Source: *See* the May 2000 Release.

Can a company be held liable under the securities laws for content provided by the company to a third party to be posted on the third-party's website?

Yes, but this risk of liability can be reduced if the company shifts the risk to the third party through a contractual agreement.

However, the parties may not be able to shift all risks. For example, a company may contract with third parties to post its offering materials on third-party platforms. In such a case, the company remains liable under the securities laws for the offering materials.

If the content contributed by a company to a third party is not offering material or an "offer," courts may analyze whether investors could reasonably believe that content on a third-party's platform is the company's content. Under this analysis, the fact that content is not labeled as coming from the company may persuade a court.

Can a company be liable if one of its social media platforms is "hacked" and misleading content is posted?

Perhaps. There have been cases where companies were held liable for not preventing foreseeable intervening criminal acts. Failing to have adequate security could fall within that realm.

In the electronic delivery context, the SEC has stated that companies must take reasonable precautions to ensure the integrity and security of the information delivered electronically. *See* the May 2000 Release. However, under the antifraud provisions of Rule 10b-5 under the Exchange Act, a company must be reckless to be held liable; mere negligence is not actionable.

Are companies being sued for their website content?

Yes. The plaintiffs' bar recognizes that corporate websites can be sources for actionable statements in connection with securities class actions. They look for overly optimistic statements or forward-looking information on web pages that companies may overlook when scrubbing their websites, such as the "About Us" or "President's Message" sections.

Disclaimer Use in Corporate Web Content

Can a disclaimer protect a company from liability for links to third-party content?

Yes, but not completely. The SEC has made it clear that disclaimers cannot provide full protection from liability. The SEC is concerned that unscrupulous companies

may use a disclaimer as a shield from liability for making false or misleading statements.

The adequacy of a disclaimer is determined on a facts and circumstances basis. According to the SEC's guidance in the May 2000 Release (footnote 61), the use of a disclaimer is one factor that may be considered in determining whether a company is liable for linked content. The SEC repeated this guidance in Section II(B)(2) of the August 2008 Release. However, the SEC has made it clear that disclaimers do not completely insulate a company from liability, for links or otherwise. Disclaimers should be drafted in a manner that is specific to the applicable risks.

On social media platforms, companies have less control over the interface, and less "room" to include recommended disclaimers, so they must be even more careful not to include or link to content that could give rise to liability.

Source: The SEC's statement that disclaimers cannot guarantee that companies will not be liable is in footnote 61 and accompanying text of the May 2000 Release. The SEC repeated this guidance in the August 2008 Release.

How do companies typically provide web disclaimers?

With a "Terms and Conditions" or a "Legal" link on their home pages that generally is in small print at the bottom of the pages. In many cases, the "Terms and Conditions" or "Legal" link is a static link, meaning that it appears on each page of the website. Often, the link itself is not descriptive, and visitors are not urged to click it.

If a link to a disclaimer is merely called "Terms and Conditions," it may not be reasonable to expect investors to know that the linked page contains disclaimers. Accordingly, companies are advised to post disclaimers in locations and in a manner that will attract a reader's attention. For example, disclaimers can be located in text boxes on applicable web pages or in pop-up boxes that are activated when the website user clicks on specified content.

Disclaimers for third-party content should be part of exit notices or intermediate screens that appear when the user is directed to the linked content.

In the August 2008 Release, the SEC provided that a company may post summary information on its website and cautioned companies to use explanatory language to warn the reader of the summary, overview or abbreviated nature of the content. Such explanatory language may be provided in the form of a disclaimer.

How many web pages within a corporate website typically contain web disclaimers?

In many websites, disclaimers are limited to the home page and/or the investor relations page. However, many websites post disclaimers in a static link, meaning they appear on each page on the website, usually on the bottom of the page. This is the safer course of action. Links on a website that do not link to the home page ("deep links") should have disclaimers accessible from each web page. Otherwise, an investor (or other website visitor) arguably may not have knowledge, whether constructive or otherwise, that the disclaimers exist.

Updating Website Content

Does a company have a duty to update web content?

Maybe. Outside of the web context, courts have disagreed for quite some time over whether companies

have a duty to update statements made by a company that were true when made. Some commentators have applied the same arguments to websites because website content is continuously available. In other words, the website content is continuously "published" and "alive" and, consequently, the line between information that was misleading when "made" and information that becomes misleading after subsequent events have come to pass is blurred. *See "For how long does a company have a duty to update (if such a duty exists)?"* According to SEC Release No. 34-58288, Section II(B)(1), the maintenance of previously posted materials or statements on a company's website is not deemed to be the reissuance or reposting of such materials or information solely because they remain accessible to the public, nor is there a duty to update such information.

A company should make it apparent to the users of its website that posted materials or statements speak to a certain date or to an earlier period. The SEC has stated that if such distinctions are not apparent to the reasonable person, the posted materials should be separately identified as historical or previously posted materials or statements and located in a separate section of the company's website containing previously posted materials or statements. Of course, the foregoing analysis does not apply if a company affirmatively restates or reissues a statement. Generally, reissued or restated information should be accurate when reissued or restated.

It seems likely that in the case of Facebook or Twitter postings, which by their nature are updates as of a particular time, the SEC would be more likely to find that a reasonable person would understand that the posting speaks only as of a certain time.

It is worth noting that Congress specifically did not impose a duty to update forward-looking information when it passed the Private Securities Litigation Reform Act of 1995, or the PSLRA. Section 27A(d) of the Securities Act and Section 21E(d) of the Exchange Act, enacted under the PSLRA, state that a duty to update doesn't necessarily arise merely by making a forward-looking statement. However, there clearly is a duty to update a company's SEC reporting disclosure if the company is conducting an offering, otherwise has an SEC filing obligation or voluntarily makes a filing. Accordingly, a company should reconsider and review its web content if it is conducting an offering or intends to do so.

Sources: For purposes of website content, *see* the August 2008 Release. With respect to the duty to update outside of the website context, since *Backman v. Polaroid Corp.*, 910 F.2d 10 (1st Cir. 1990), courts have been divided as to whether there is a duty to update disclosure that subsequently becomes misleading. For example, the following courts found a duty to update (at least to some extent): *In re Omnicare, Inc. Securities Litig.*, 769 F.3d 455 (6th Cir. 2014); *In re IBM Corp. Securities Litig.*, 163 F.3d 102 (2nd Cir. 1998); *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410 (3rd Cir. 1997); *Weiner v. Quaker Oats, Inc.*, 129 F.3d 310 (3rd Cir. 1997); and *Shaw v. Digital Equipment*, 82 F.3d 1194 (1st Cir. 1996). Note, however, that in the *Shaw* case, the First Circuit held that cautiously optimistic comments may not create a duty to update in certain cases.

On the other hand, the following courts did not find a duty to update: *Finnerty v. Stiefel Laboratories, Inc.*, 756 F.3d 1310 (11th Cir. 2014); *Gallagher v. Abbott Laboratories*, 269 F.3d 806 (7th Cir. 2001); *Eisenstadt v. Centel Corp.*, 113 F.3d 738 (7th Cir. 1997); *San Leandro*

Emergency Med. Plan v. Phillip Morris Cos., 75 F.3d 801 (2d Cir. 1996); *Gross v. Summa Four, Inc.*, 93 F.3d 987 (1st Cir. 1996); *Stransky v. Cummins Engine Co.*, 51 F.3d 1329 (7th Cir. 1995); and *Hillson Partners v. Adage Inc.*, 42 F.3d 204 (4th Cir. 1994). The 9th Circuit's position on the duty to update is ill defined and unclear.

Does a company have a duty to correct web content?

It depends. Most courts find that a company has a duty to correct information if it discovers the information was misleading or inaccurate when stated. *See "Should a company have an investors relations web page?"* Following this theory, as the antifraud provisions of the federal securities laws apply to web content, companies should correct web content that was misleading or inaccurate when posted, particularly if the content may be deemed to be material to an investor.

In certain circumstances, regulations allow a company to post certain documents on its website rather than filing the documents on EDGAR. A material misstatement or omission in any such document would be deemed a violation of the regulations relating to such document. Accordingly, material misstatements or omissions in such documents should be corrected to the same extent that a company would correct a document filed on EDGAR.

Source: The SEC stated in Release No. 33-6084 (August 2, 1979) that, depending on the circumstances, companies have a duty to correct information in SEC filings that was misleading from the outset or that was made misleading by subsequent events. *See also Ross v. A.H. Robbins Co.*, 465 F. Supp. 904, 908 (S.D.N.Y. 1979), *rev'd on other grounds*, 607 F.2d 545 (2d Cir. 1975), *cert. denied*, 446 U.S. 946 (1980); *In re IBM Corp. Sec. Litig.*, 163 F.3d 102, 169 (2d Cir. 1998).

With respect to Exchange Act filings made on a website, *see* the August 2008 Release.

Does a company have a duty to update information which it did not have a duty to disclose?

Probably not. Case law indicates that there is no duty to update statements that are not made in an SEC filing and do not contain material information. The argument is that the information is not material, so there is no duty (or need) to update the information. However, it is quite difficult to know with certainty whether information is "material," since a determination regarding materiality is based on a facts and circumstances test and likely will only be made in hindsight.

Source: In *US v. Schiff*, 602 F.3d 152 (3d Cir. 2010); *Hillson Partners L.P. v. Adage*, 42 F.3d 204 (4th Cir. 1994); *In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259 (2d Cir. 1993) *cert. denied*, 511 U.S. 1017 (1994); and *Gross v. Summa Four Inc.*, 93 F.3d 987 (1st Cir. 1996), the courts did not find a duty to update for predictions that were not material under the federal securities laws.

Is there a difference between a duty to update and a duty to correct?

Yes. Most courts find that companies have a duty to correct incorrect statements, but it is uncertain if companies have a duty to update statements that were not accurate when made.

A duty to correct applies to facts that are misleading or inaccurate when made. A duty to update applies to facts that become misleading or inaccurate by virtue of the passage of time or due to subsequent events.

As a practical matter, since courts often are not clear about the difference between these two duties,

companies are advised to continuously monitor their disclosures, and to consider updating or correcting information on a case by case basis. On the other hand, companies should be careful not to indicate to the market that they have assumed or otherwise adopted a duty to update.

Source: *See In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410 (3d Cir. 1997), in which the court noted a difference between the two duties.

For how long does a company have a duty to update (if such a duty exists)?

For as long as the fact is "alive."

Unfortunately, there is no bright line test to determine the lifespan of a fact. Courts apply a facts and circumstances test. Generally, a fact may be deemed "alive" as long as the market could reasonably rely on the fact. A legend disclaiming the duty to update may help a company argue that a prior statement is not "alive."

With respect to information posted on a company's website, the SEC has stated that the maintenance of previously posted materials or statements on a company's website is not deemed to be the reissuance or reposting of such materials or information solely because the materials remain accessible to the public, nor is there a duty to update such information, absent other factors. *See* the August 2008 Release.

Source: In *A.H. Robins*, 607 F.2d 545 (2d Cir. 1979), *cert. denied*, 446 U.S. 946 (1980), the court noted that one of the "facts and circumstances" to consider was "whether subsequent similar types of information are available (*e.g.*, a two-year old annual report is stale if a more recent report is available). *See also City of Edinburgh Council v. Pfizer, Inc.*,754 F.3d 159 (3d Cir. 2014); *Winnick v. Pac. Gateway Exch. Inc.* (9th Cir. 2003); the August 2008 Release Section II(B)(1).

How can a company avoid creating a duty to update information posted to the web?

A company should take care to ensure that it does not act in a manner that is deemed to affirmatively restate or reissue a statement made on one of its web platforms. If a company affirmatively restates or reissues a statement, the company may create a duty to update the statement so that it is accurate as of the date it is reissued or restated. In addition, a company should make sure that, to the extent applicable, its web content is presented in a manner that makes it apparent to the reasonable person that the content speaks as of a certain date or earlier period.

A company should actively manage its web content through the following activities, among others:

- Empowering the company's disclosure committee or similar body to monitor web disclosures.
- Creating a separate "archive" web page for historical or previously-posted information (with an "archive" label in the title of the page).
- Clearly dating content that is posted, particularly for time-sensitive material (including dating content that has been moved to an "archive" section). *See "What are the best ways to date content on a website?"*
- Designating one or more employees (including someone from the legal department) to be responsible for the process of dating information or moving information to a section

identified as historical or containing previously-posted information.

- Regularly verifying that content remains accurate and timely, and if it is not, removing or archiving the content. Offering materials should be promptly removed after the prospectus delivery period ends so that investors trading in the company's securities on the open market can't claim that they relied on the disclosure in these materials.
- Regularly verifying that links are active and that third-party content does not impose additional liability risks. *See "Is a company liable for web content provided by a third party?"*

Some companies expressly disclaim a duty to update statements on their websites. It is not clear that these disclaimers are effective, but they likely would not be deemed effective by a court if a company were reckless in not updating its content. In other words, a mere disclaimer might not be enough to protect a company. Companies are advised to regularly monitor their websites as discussed herein, rather than relying on the use of disclaimers.

Social media sites like Twitter and Facebook operate more or less like timelines, so the dating of content is automatically imposed. Likewise, media sharing sites like YouTube display the date that material was posted. As a result, social media content typically presents a less significant dating problem than traditional website content.

What are the best ways to date content on a website?

A company should date materials on its website in a manner that makes it apparent to the reasonable investor that the materials or statements are made as of the identified date or as of an earlier period. A company should also use terminology that does not suggest or imply that the company actively updates the content on the website and avoid acting in a manner that suggests it has adopted a practice of updating such information. For example, some practitioners advise that a website should state that content was "last posted on March 31, 2008" rather than stating "last updated March 31, 2008." Similarly, a common caption on IR web pages is "Current SEC Filings," but it is better to use the label "Recent SEC Filings."

Companies should not rely solely on the date in a press release byline as a dating practice. *See "Is a date in the byline of a posted press release sufficient to avoid a duty to update?"* Companies should have a special archival section on IR web pages for older press releases or otherwise organize the press releases by date. A date should also be included in the link that leads to the press release (so that it is clearly visible even before the press release is accessed and puts an investor on notice as to its "freshness").

Is a date in the byline of a posted press release sufficient to avoid a duty to update?

It should be. *See "What are the best ways to date content on a website?"*

Does similar content with a later date automatically update other content on a company's website?

There is no clear answer to this question. Accordingly, companies should include dates on all documents posted on their websites and should regularly move older documents to an "archive" section for historical or previously-posted documents. Some commentators argue that documents should be read in the context of

other documents posted on the website and that more recent online disclosures should automatically be considered to update the older content. *See "Does a company have a duty to update web content?"*

Source: In its August 9, 2000, comment letter on the May 2000 Release, the Committee on Federal Regulation of Securities of the Business Law Section of the ABA noted that lack of a date on a posted document should not be used against a company.

Investment Advice on Corporate Websites

Can a company's web content be considered investment advice?

If a company's web content contains or links to media articles or other information relating to its future financial performance, the company may be deemed to be providing investment advice under either the adoption or entanglement theories.

A disclaimer may help a company avoid investment adviser status, but likely will be effective only if the web content truly does not provide investment advice. *See* "Understanding a Company's Potential Liability under the Securities Laws for Web Content."

Developing a Corporate Website

What should be counsel's role in developing web content?

Company counsel should have an active role under the powers created by a company's web content development policy. Company counsel should also play a role in creating the web content development policy and in amending and supplementing the policy from time to time, as appropriate. In addition, company counsel should participate in formulating a policy or process relating to public communications, or a Fair Disclosure Policy, that would include periodic website (and social media presence) maintenance.

Ideally, company counsel should review all content before it is posted on, or linked to, a company's website or social media accounts. Counsel should ensure that there is a process to regularly monitor content for continued accuracy and relevance.

Counsel should also encourage the company's investor relations department (rather than the marketing department) to prepare the IR web page of the company website, if such a page is maintained. IR professionals are more likely to be sensitive to securities law matters than marketing personnel. If a service provider creates or maintains a company's IR web page, counsel should be actively involved to ensure undue risks are not taken.

As a practical matter, review by counsel of content prior to its posting or linking may not be feasible, particularly in larger or technology-oriented companies that have multiple web platforms. At a minimum, company counsel should regularly review all investor relations or corporate web content.

As part of its review, counsel should draft disclaimers that are tailored for specific content and consider drafting risk factors for the IR web page. A company might describe the same risk factors it describes in its SEC filings (with a disclaimer that it was drafted as of the filing date), providing any necessary updates on an ongoing basis, or the company might simply provide a link to the risk factors section in the latest SEC filing.

What should be counsel's role in developing an intranet?

Just as with a website, company counsel should pre-screen or at least regularly review intranet content. To the extent feasible, company counsel should treat the content of an intranet the same as counsel treats the content on the website. *See "What should be counsel's role in developing web content?"*

Counsel should review disclaimers used on the intranet. Disclaimers should be used on intranets because employees (who also are stockholders or option holders in many cases) and others who have intranet access can bring claims based on the intranet content. Disclaimers may help limit liability, but are subject to the limitations discussed in these FAQs.

What is a web content development policy?

A web content development policy provides internal guidance as to what type of content can be posted on a company's web platforms (including its intranet) and describes the process for approving content before it is posted. The web content development policy goal should be to create a uniform web strategy for the company and to reduce the risk of liability under the securities or other laws. Larger companies may have numerous websites and social media accounts created by distinct business units which can result in conflicting content of disparate quality. A company's webmasters should have limited control over the substance of content to reduce the risk of liability under the securities or other laws.

What should be included in a web content development policy?

A web content development policy should contain a clear description of who should preapprove and monitor content for a company's web platforms (including its intranet). Counsel, either in-house or outside, should play an active role in the approval and monitoring process. However, it probably isn't necessary for counsel to approve each kernel of information, particularly if counsel played a role in drafting that information (*e.g.*, SEC filings and press releases). *See "What should be counsel's role in developing web content?"*

The web content development policy also should prescribe how the web content should be monitored to correct, archive, or remove content to reduce the risk of creating a duty to update, and require disclaimers that are tailored for specific content. For example, forward-looking information should have a disclaimer either linked to it or near it.

The policy also should require that the company maintain records describing the precise content of the company's web content at regular intervals. This enables the company to demonstrate what was posted at any given time (although this information could be harmful in a lawsuit if content is not properly managed).

Must documents posted on a company's website be posted in a printer-friendly format?

Not necessarily. For purposes of federal securities laws, materials posted by a company on its website need to be posted in a printer-friendly format only if expressly required by applicable rules and regulations. For example, with respect to the availability of proxy

materials on the Internet, Rule 14a-16(c) under the Exchange Act requires proxy materials to be presented in a format convenient for both reading online and printing on paper when delivered electronically. A company should also consider whether any state corporate laws are relevant to this question.

Source: The August 2008 Release.

Regulation FD and Company Web Content

Regulation FD provides that whenever a public company, or any person acting on its behalf, discloses material nonpublic information to certain enumerated persons, the company must simultaneously, in the case of intentional disclosures, or promptly, in the case of unintentional disclosures, make public disclosure of that same information. Enumerated persons covered by Regulation FD are limited to securities market professionals such as brokers, investment advisors, investment managers, buy-side and sell-side analysts and shareholders who it is reasonably foreseeable would trade on the basis of the information. There are many exceptions and qualifications to Regulation FD which will not be described in these FAQs.

To be diligent regarding its web content and compliance with Regulation FD, a company should consider whether the content is "public" for purposes of Regulation FD. If not, the posting of material nonpublic information may be deemed to be selective disclosure to enumerated persons unless the same information is made public in another manner that complies with Regulation FD. In addition, if a company discloses material nonpublic information to an enumerated person, can the simultaneous or prompt posting of the same information on the company's website ensure that the disclosure is compliant with Regulation FD? These considerations are the subject of the following FAQs.

In the following FAQs, there is discussion of certain factors provided by the SEC for companies to use in determining, on their own, whether they meet certain criteria relating to the "public" nature of web content. These factors are considerably subjective and, absent testing of the facts and circumstances before the SEC or the courts, one cannot be certain how to interpret the tests. There are no safe harbors to rely on.

Are materials that are posted on a company's website public for purposes of Regulation FD?

It depends. The August 2008 Release answers a number of questions regarding Regulation FD, including how a company may evaluate whether and when information posted on its website is public so that the disclosure of that information to an enumerated person will not be a violation of Regulation FD. According to the SEC, companies should consider the following factors:

- whether the posting of information on a company website disseminates the information in a manner that makes it available to the securities marketplace in general; and
- whether there has been a reasonable waiting period for investors and the market to react to the posted information.

Source: The August 2008 Release

Are materials that are posted to (or linked from) social media platforms public for purposes of Regulation FD?

Just as with the Company's website, the answer is that it depends. On April 2, 2013, the SEC issued guidance providing that social media platforms may be used by

companies to disseminate material information, without running afoul of Regulation FD.[1] The SEC emphasized that companies should apply the August 2008 Release's guidance regarding the disclosure of material information on company websites when analyzing whether a social media channel is in fact a "recognized channel of distribution," including that investors must be provided with notice of the specific channels that a company will use in order to disseminate material nonpublic information.

The SEC confirmed that Regulation FD applies to social media and other emerging means of communication used by companies in the same way that it applies to company websites. The SEC indicates that every situation must be evaluated on its own and that disclosure of material nonpublic information on the personal social media site of an individual corporate officer, without advance notice to investors that the social media site may be used to disseminate information about the company, is unlikely to qualify as an acceptable method of disclosure.

At this point in time, it is likely best for companies to utilize social media as a supplement to, and not a replacement for, the more traditional means for disseminating material non-public information.

How can a company determine whether its web content is a recognized channel of distribution and whether posting information on the website properly disseminates the information for purposes of Regulation FD?

The determination of whether a particular company's website is a recognized distribution channel will depend on the steps that the company has taken to alert the market to the existence of its website and its disclosure practices, as well as the use by investors and the market of the company's website. To analyze the dissemination question for purposes of Regulation FD, a company should focus on the manner in which information is posted on the company's website, and the timely accessibility of such information to investors and the markets. The SEC has provided the following non-exclusive factors for companies to consider in evaluating whether their websites are recognized distribution channels and whether company information on such sites is "posted and accessible," and therefore, "disseminated:"

- Whether and how a company lets investors and the markets know that the company has a website and that they should look at the company's website for information. For example, does the company include disclosure in its periodic reports (and in its press releases) of its website address and disclose that it routinely posts important information on its website;
- Whether the company has made investors and the markets aware that it will post important information on its website and whether it has a pattern or practice of posting such information on its website;

[1] The SEC issued the guidance in the form of a Report of Investigation under Section 21(a) of the Exchange Act. *See* Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: Netflix, Inc., and Reed Hastings, Release No. 34-69729 (April 2, 2013) (the "21(a) Report") available at http://www.sec.gov/litigation/investreport/34-69279.pdf.

- Whether the company's website is designed to lead investors and the market efficiently to information about the company, including information specifically addressed to investors, whether the information is prominently disclosed on the website in the location known and routinely used for such disclosures, and whether the information is presented in a format readily accessible to the general public;
- The extent to which information posted on the website is regularly picked up by the market and readily available media and reported in such media, or the extent to which the company has advised newswires or the media about such information and the size and market following of the company involved. For example, in evaluating accessibility to the posted information, companies that are well-followed by the market and the media may know that the market and the media will pick up and further distribute the disclosures they make on their websites. On the other hand, companies with less of a market following, which may include companies with smaller market capitalizations, may need to take more affirmative steps so that investors and others know that information is or has been posted on the company's website and that investors should look at the company website for current information about the company;
- The steps the company has taken to make its website and the information accessible, including the use of "push" technology, such as RSS feeds, or releases through other distribution channels, either to widely distribute such information or advise the market of its availability. The SEC states that it does not believe, however, that it is necessary that push technology be used in order for the information to be disseminated, although that may be one factor to consider in evaluating the accessibility to the information;
- Whether the company keeps its website current and accurate;
- Whether the company uses other methods in addition to its website posting to disseminate the information and whether and to what extent those other methods are the predominant methods the company uses to disseminate information; and
- The nature of the information.

Source: The August 2008 Release.

Although social media is being more broadly used, it may still be too early to conclude that it is a recognized channel of distribution. While this is an evolving area, most people interested in finding investment-related information would likely not first turn to a company's Facebook or Twitter account. Instead investors are more likely to visit a company's website or the SEC's EDGAR website. Companies have also not routinely listed their social media addresses in periodic reports or press releases; rather, these alternative addresses are more likely to be found in promotional materials for a company's products or services. Following the release of the 21(a) Report, a number of companies identified various social media sites through which they intended to disseminate information; however, practices are still evolving.

As a tool to disseminate information, social media has both significant advantages and disadvantages over a traditional website. Social media is far more advanced in utilizing push technology to communicate. Unlike a traditional website, a Twitter message or Facebook posting can be pushed instantaneously to all followers or friends. A company utilizing social media does not have to wait for an investor to affirmatively check its website, but can notify its followers immediately when new information is posted. This instantaneous mode of communication comes with a significant downside, however, as the amount of information that can be transmitted is limited. Unlike a website that can deliver multiple pages of information with embedded files and tables, most social media outlets can only communicate a fraction of that amount of information. In addition, social media requires that, in most cases, individuals must sign up and be accepted in order to participate in the communication, so it is not a mechanism for communication that is generally open to the public.

The evaluation of whether there has been a reasonable waiting period for investors to react to information provided through social media will ultimately depend on the popularity of each company's social media presence. For example, with companies such as Google and Coca Cola that each have millions of followers, a message sent over their Twitter or Facebook accounts would likely be considered adequately publicly disseminated within a short period of time after being transmitted. By contrast, for companies with far fewer followers, there may need to be a longer time lag after the information is communicated before the information could be considered adequately publicly disseminated.

How can a company determine whether investors and the market have been afforded a reasonable waiting period to react to information posted on its website for purposes of Regulation FD?

The determination depends on the particular facts and circumstances of the dissemination of the information in question. The SEC has provided the following factors that a company may consider in making the determination:

- The size and market following of the company;
- The extent to which investor oriented information on the website is regularly accessed;
- The steps the company has taken to make investors and the market aware that it uses its website as a key source of important information about the company, including the location of the posted information;
- Whether the company has taken steps to actively disseminate the information or the availability of the information posted on the website, including using other channels of distribution of information; and
- The nature and complexity of the information.

The SEC advises that if information is important, companies should consider taking additional steps to alert investors and the market to the fact that important information will be posted. For example, prior to posting the information on the website, the company should consider filing or furnishing such information to the SEC or issuing a press release with the information. Adequate advance notice of the particular posting, including the date and time of the anticipated posting

and the other steps the company intends to take to provide the information, will help make investors and the market aware of the future posting of information, and will, thereby, facilitate the broad dissemination of the information.

The SEC also advises that case law relating to the waiting period in the context of insider trading may provide guidance to companies for purposes of Regulation FD.

Companies should keep in mind that although posting information on a company's website in a location and format readily accessible to the general public would not be "selective" disclosure, the information may not be "public" for purposes of determining whether a subsequent selective disclosure implicates Regulation FD. Accordingly, if, based on the analysis discussed herein, information on a company's website is not public, then subsequent selective disclosure of that information, if material, may be a violation of Regulation FD if not remedied accordingly.

Source: The August 2008 Release.

For purposes of Regulation FD, may a company use its website to provide a broad, non-exclusionary distribution of information to the public that was the subject of selective disclosure?

Maybe. Generally, under Regulation FD, a company must file or furnish a Current Report on Form 8-K or use an alternative method or methods of disclosure that are reasonably designed to provide broad, non-exclusionary distribution of the information to the public: simultaneously, in the case of an intentional disclosure, or promptly, in the case of an unintentional disclosure. According to the SEC, due to the current usage of the Internet, the posting of information on a company's website may be a sufficient method of public disclosure under Rule 101(e) of Regulation FD for some companies in certain circumstances (and, hence, avoid the need to file a Form 8-K). The analysis must be made by a company on an individual basis.

In undertaking this analysis, a company must first consider whether its website is a recognized distribution channel and whether the information is "posted and accessible" and, therefore, "disseminated." The factors to be considered with this analysis have been described in these FAQs. *See "Are materials that are posted on a company's website public for purposes of Regulation FD?" See also "How can a company determine whether its web content is a recognized channel of distribution and whether posting information on the website properly disseminates the information for purposes of Regulation FD?"* and *"How can a company determine whether investors and the market have been afforded a reasonable waiting period to react to information posted on its website for purposes of Regulation FD?"* The company's ability to meet the simultaneous or prompt timing requirements for public disclosure once a selective disclosure has been made must also be part of that analysis. Lastly, according to Regulation FD, the requirement to provide "broad, non-exclusionary distribution of information" may be satisfied through more than one medium, so the analysis may consider the attributes of the website combined with other means used by the company to distribute information to the market.

Source: The August 2008 Release.

What Are Companies Posting on their IR Web Pages?

Should a company have an investor relations web page?

Yes. Although a company is not required by law to maintain a website, the use of websites by public companies is encouraged by the SEC, most of the national securities exchanges and market participants. The New York Stock Exchange requires that its listed companies maintain a website, subject to certain exceptions. *See* Item 307.00 of the NYSE's Listed Company Manual. However, none of the other national securities exchanges expressly requires the maintenance of a website. The lack of an IR web page on a public company's website, or the lack of a website, may project a negative view of the company. Over the last few years, IR web pages have become an important resource for market participants.

There are numerous reasons why a public company would maintain an IR web page. An IR web page is the appropriate place to post documents, or links to documents, that are required or suggested to be made available on the company's website. For example, Items 101(e)(3) and (4) of Regulation S-K, depending on the type of issuer, either encourage or require companies to disclose in various public filings the URL of their websites if they have one, and provide that if a public company does not post its periodic reports, including amendments to such reports, on its website, it must disclose that fact in certain reports and other filings and state its reasons for not doing so. Similarly, the instructions to many forms of registration statements include a provision that directs the registrant to provide the URL of its website, if available. In addition, if a public company maintains a corporate website, it is required to post on the website all of the Section 16 filings made by the company's officers, directors, and 10% stockholders with respect to the company. Finally, in certain circumstances, a public company has the choice to satisfy certain Exchange Act filing requirements by posting the information exclusively on the company's website instead of filing the information on EDGAR. For example, public companies may post their board committee charters on their websites rather than providing the charters in a proxy or information statement. In addition, public companies may disclose non-GAAP financial measures and information required by Regulation G on their websites. There are other examples. *See* SEC Release No. 34-58288, Section II(B).

Since 2009, issuers have also begun complying with the SEC's requirement that public companies provide access to their financial statements in an interactive, online format (compliance has been phased in, first for larger issuers, increasingly for all issuers).

IR web pages are also useful for the posting of materials in compliance with the rules and regulations of national securities exchanges. For example, under Rule 5250 of the Nasdaq Manual, a company listed on Nasdaq may satisfy its obligation to make annual or interim reports available to its shareholders by posting the reports on its website together with an undertaking to provide shareholders with a hard copy of the reports upon request, free of charge. IR web pages may also be used as the location for dissemination of public information for purposes of Regulation FD. *See "For purposes of Regulation FD, may a company use its website to provide a broad, non-exclusionary distribution of information to the public that was the subject of selective disclosure?"*

The uses for an IR web page are expanding. In January 2007, the SEC adopted universal E-Proxy rules

that require certain public companies to post proxy materials on a website (other than EDGAR). Large Accelerated Filers were required to do so as of January 1, 2008. Other categories of filers have been required to do so since January 1, 2009. An IR web page is an obvious location for such postings. Many public companies now have entire web pages devoted to their annual meeting of shareholders or otherwise devote a significant portion of their websites to annual meeting materials.

An IR web page may be used to host an electronic shareholder forum or a blog. E-forums and blogs facilitate the exchange of information about a company. Many companies have one or more blogs that are accessible directly from their websites. Many blogs may be accessed directly from a company's investor relations section. Many companies post links to Twitter or Facebook and mirror content posted to those platforms. On February 25, 2008, certain amendments to the federal proxy rules, which were adopted to facilitate the use of e-forums, became effective.

What are the implications of using an IR web page to post information?

As mentioned above, there are circumstances in which a public company may satisfy certain Exchange Act filing obligations by posting information exclusively on its website rather than on EDGAR. A public company's disclosure controls and procedures would apply to such information, as its disclosure is required under the Exchange Act. Accordingly, a public company that elects to make use of its website to satisfy Exchange Act filing obligations must make sure that its disclosure controls and procedures address such website disclosures.

Public companies are now required to provide financial statement information in a form, commonly referred to as XBRL, that can be downloaded directly into spreadsheets, analyzed in a variety of ways using commercial off-the-shelf software and used with investment models in other software formats. The rule requires that each filer covered by the rule provide the financial data on its corporate website, if it has one. Filers are not able to satisfy this obligation by providing a hyperlink to the same documents on the SEC's website.

IR web pages are useful to help investors easily find the type of information they desire. Moreover, if all investment-related information is grouped in one place, the company may gain some protection from securities law liability for the other content on the website on the grounds that such content does not relate to investment decisions. Note that the converse argument is likely to be made by the plaintiffs' bar: that since content on an IR web page was directed toward investors, all of the content on the IR web page should be subject to the securities laws.

With these considerations in mind, IR web pages are not the place for hype or other promotional content due to the antifraud provisions of the federal securities laws. It may even be wise to place the "President's Message" from a glossy annual report on the company's home page rather than the IR page, although detaching it from the rest of a posted annual report is not a good idea. (SEC-mandated documents should appear online as they do off-line, unless two different versions are filed with the SEC.)

What materials are commonly included on IR web pages?

Relatively common documents included on an IR web page include:

- earnings releases and other press releases;
- corporate governance policies or guidelines;
- the company's charter documents;
- the company's code of ethics;
- SEC filings, either directly or by linking to an EDGAR database;
- stockholder meeting information;
- glossy annual reports;
- analyst conference call announcements, webcasts, or scripts;
- stock prices and stock price data (often delayed 20 minutes);
- frequently asked questions about obtaining IR-related information;
- financial statements carved out from SEC filings (this could be risky since they are not complete documents; however, *see "Can a company post summary information on its website?"*);
- XBRL data;
- management speeches or presentations;
- corporate profiles;
- whistleblower contact details; and
- transfer agent information.

Most of these items also should include appropriate disclaimers, particularly if they contain forward-looking information.

Can a company post summary information on its website?

Yes. The SEC has stated that it believes that a public company's use of summaries or overviews of more complete information located elsewhere on the company's website can be helpful to investors. However, summaries or overviews should contain explanatory language notifying the user of the website that the information is only a summary or an overview and should be accompanied by features that are designed to alert the users of the website to the location of the detailed disclosure from which such summary information is derived or upon which such overview is based, as well as to other information about a company on a company's website.

The SEC has provided the following techniques that a public company should consider to highlight the nature of summary or overview information related to more complete information located elsewhere on the company's website:

- *use of appropriate titles* – an appropriate title or heading that conveys the summary, overview or abbreviated nature of the information could help to avoid unnecessary confusion;
- *use of additional explanatory language* – companies may consider using additional explanatory language to identify the text as a summary or overview and the location of the more detailed information;
- *use and placement of hyperlink* – placing a summary or overview section in close

proximity to hyperlinks to the more detailed information from which the summary or overview is derived or upon which the overview is based could help an investor understand the appropriate scope of the summary information or overview while making clearer the context in which the summary or overview should be viewed; and

- *use of "layered" or "tiered" format* – in addition to providing hyperlinks to more complete information, companies can organize their website presentations such that they present the most important summary or overview information about a company on the opening page, with embedded links that enable the reader to drill down to more detail by clicking on the links. In this way, viewers can follow a logical path into, and, thereby, obtain increasingly greater details about, the financial statements, a company's strategy and products, its management and corporate governance, and the many other areas in which investors and others may have an interest.

Source: The August 2008 Release, Section II(B)(3).

What are the implications for a company if it hosts blogs or electronic shareholder forums on its website?

A public company may be liable for statements made by or on behalf of the company on a blog or an electronic shareholder forum. All communications made by or on behalf of a public company are subject to the antifraud provisions of the federal securities laws. This is the case whether or not the blog or forum is hosted by the public company.

The SEC has acknowledged the utility of blogs and electronic shareholder forums and has stated that it wants to promote the use of blogs and electronic shareholder forums as they are important means for companies to maintain a dialogue with their various constituencies. If companies host blogs or electronic shareholder forums on their websites, they must keep in mind that the content thereof is subject to the antifraud provisions of the federal securities laws. A company should designate specific persons within the organization to post information on the blogs and/or forums and should restrict all other officers, directors, employees, consultants and contractors from posting any information on such blogs or forums, to the extent possible. Preferably, the company should adopt a written policy for the designated persons to follow with respect to their postings. The designated persons should be well trained in the legal, business and marketing implications of the statements made and have ready access to the company's internal and external counsel. In addition, such persons should be aware of limitations on disclosure outside of the federal securities laws that are specific to their industry or industries. For example, pharmaceutical companies want to limit some of the information they disclose about their regulatory progress as doing so may run afoul of FDA regulations or otherwise cause a problem with the FDA. The company should make it clear to its designated persons that they are not allowed to post information on behalf of the company in a manner that is not compliant with the company's policy. Companies should consider implementing controls and procedures to monitor statements made by or on behalf of the company on blogs and electronic shareholder forums.

Public companies should also be aware that they cannot require investors to waive any of the protections of the federal securities laws as a condition to entering into or participating in a blog or a forum. Any term or condition of a blog or electronic shareholder forum requiring users to agree not to make investment decisions based on the blog's or forum's content or disclaiming liability for damages of any kind arising from the use or inability to use the blog or forum is inconsistent with the federal securities laws and, according to the SEC, may violate the anti-waiver provisions of the federal securities laws.

Can a company be liable for stock prices posted on its website?

Yes, although it is unlikely. One possible claim is that a posted stock price was inaccurate and an investor relied on it to place a trade order.

Many public companies post recent stock price quotes on their websites. The stock price data is provided by a third party, and a 20-minute delay is typical. Companies should make sure that a disclaimer accompanies the stock price data warning users of the website that the data is provided by a third party and may be inaccurate, and that the company is not responsible for the data.

Many of these disclaimers also state that the third parties that provide the data do not have liability for the data, even though they would appear to be more culpable if the data were inaccurate. Companies should attempt to negotiate their contracts with third parties to ensure that they are indemnified if the third party provides incorrect data. *See "Is a company liable for web content provided by a third party?"*

Can a company be liable for linking to a website that has incorrect stock prices?

Not likely. Based upon SEC guidance and provided that the company followed the guidance set forth herein regarding hyperlinked information and the use of disclaimers, it would appear that there would have to be unusual circumstances, such as the fact that the company was aware that the stock price data would be incorrect, for the company to be liable for such a link. *See "What is the SEC's analytical framework to determine if companies are liable for third party hyperlinked content?"*

Nevertheless, companies should disclaim responsibility for the third-party information, and the disclaimer should contain a warning that the stock price data may be delayed and does not include real-time quotes (if true). *See "Is a company liable for web content provided by a third party?"*

May a company selectively choose which press releases it includes on its website?

Probably, but it is not advisable. There is no duty to post any of a company's press releases on its website, nor is there a duty to post all of them if some are posted. Some companies choose to post only investor-oriented press releases on their websites, or all press releases except for press releases relating to relatively insignificant matters. However, unless a company has a compelling rationale to selectively choose which press releases it includes on its website, and the selection criteria does not result in disclosure that is misleading to investors, a company should post either all or none of its press releases on its website.

If a company chooses to post only some of its press releases, it is advisable not to disclose its selection criteria. That would diminish the company's flexibility

in making such decisions and allow others to question its application of the criteria. The company should also make sure it is clear to the website user that the website contains "selected" press releases, not all press releases.

What Types of Web Content are "Offers"?

Can web content inadvertently be considered an offer to sell or solicitation to buy securities?

Yes. The term "offer" is interpreted broadly under the federal securities laws. The definition of the term "offer" is interpreted to include any communication that conditions the market or arouses public interest in a company's securities, even if the company does not believe that this information involves an "offer" of its securities. This interpretation may include web-based promotional product and services information generated by a company.

Another issue is whether promotional product and services information posted by a company is considered a "general solicitation or advertisement" with respect to any offering. If it is, the posting of such information would cause the company to be ineligible to rely on certain exemptions from registration under the federal securities laws set forth in Regulation D, the exemptions from registration that companies typically rely on in connection with private placements, or require that the company undertake additional investor verification or other steps.

How can a company avoid "inadvertent" offers?

The safest way to avoid an inadvertent offer is to have counsel review content, either before it is posted or regularly thereafter, and to avoid statements that essentially encourage investors to buy the company's stock. In addition, a company should take particular care to ensure that it does not post misleading information about the company or its products or services.

Rules 168 and 169 under the Securities Act provide non-exclusive safe harbors that allow public companies to disclose certain factual information or forward-looking statements without being deemed to be engaging in an "offer." Generally, to be protected by either safe harbor, the information must not relate to an offering, and the type of information disclosed must be similar to that which the company has previously disclosed in the ordinary course of its business. By complying with either rule, a company may post certain information without being deemed to have made an "offer."

Rule 433 under the Securities Act provides guidance with respect to the posting of, or linking to, historical information of a company during an offering. According to Rule 433(e), historical information that is identified as such and located in a separate section of a company's website containing historical information (which has not been incorporated by reference or otherwise included in a prospectus) and has not been otherwise used or referred to in connection with an offering, will not be considered a current offer or a free writing prospectus. Accordingly, if a company has not already done so, it should clearly mark historical information on its website as such in a clear manner.

For discussion regarding marketing efforts during an offering, *see "Can a company use marketing information for its products and services in its web content without being exposed to securities law liability?"*

Note that well known seasoned issuers (WKSIs) have less of a concern in this regard. Rule 163 under the

Securities Act allows WKSIs to make certain offers as long as they are made with a free writing prospectus, subject to certain terms and conditions. Such free writing prospectuses must contain certain legends and must be filed with the SEC, subject to certain exceptions. If a WKSI complies with these rules, its website may be changed to include a free writing prospectus that makes an offer of securities.

Can an issuer use its own website in order to conduct intrastate offerings pursuant to the Section 3(a)(11) exemption?

In a C&DI, the Staff of the SEC noted that Securities Act Rule 147 does not prohibit general advertising or general solicitation. Any such general advertising or solicitation, however, must be conducted in a manner consistent with the requirement that offers made in reliance on Section 3(a)(11) and Rule 147 be made only to persons resident within the state or territory of which the issuer is a resident.

In its guidance the Staff of the SEC notes that, "Although whether a particular communication is an "offer" of securities will depend on all of the facts and circumstances, using such established Internet presence to convey information about specific investment opportunities would likely involve offers to residents outside the particular state in which the issuer did business." The guidance contemplates that issuers may be able to implement technological approaches to limit their communications of any offers only to residents of a particular state.

Source: *See* Question 141.03; 141.05, Securities Act Rules, Questions of General Applicability, available at https://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm.

Can an issuer use an internet-based portal in order to promote an offering to residents of a single state in accordance with a state statute or regulation intended to enable securities crowdfunding within that state?

In a series of C&DIs, the Staff of the SEC noted that, assuming the issuer met the other conditions of Rule 147, use of the internet would not be incompatible with a claim of exemption under Rule 147 if the portal implements adequate measures so that offers of securities are made only to persons resident in the relevant state or territory. In the context of an offering conducted in accordance with state crowdfunding requirements, such measures would include, at a minimum, disclaimers and restrictive legends making it clear that the offering is limited to residents of the relevant state under applicable law, and limiting access to information about specific investment opportunities to persons who confirm they are residents of the relevant state (for example, by providing a representation as to residence or in-state residence information, such as a zip code or residence address).

Source: *See* Question 141.04, Securities Act Rules, Questions of General Applicability

Has the SEC provided a definition of a "general solicitation"?

It has always been understood that the SEC would view the types of communications that qualify as a "general solicitation" broadly. For example, any communication concerning an offering of securities that is not made to persons with whom the issuer or an agent acting on the issuer's behalf does not have a pre-existing substantive relationship and is not bilateral likely would be viewed as a "general solicitation." In C&DI guidance, the Staff of the SEC has stated that the use of an unrestricted,

publicly available website constitutes a general solicitation and is not consistent with the prohibition on general solicitation and advertising in Rule 502(c) if the website contains an offer of securities.

The Staff of the SEC also has reiterated that factual business information that "does not condition the public mind or arouse public interest in a securities offering is not an offer and may be disseminated widely."

In the absence of having a pre-existing substantive relationship with the offeree, are there certain communications about a securities offering that would not be viewed as a "general solicitation"?

Recently, the Staff of the SEC clarified that there are "long-standing practices where issuers and persons acting on their behalf are introduced to prospective investors who are members of an informal, personal network of individuals with experience investing in private offerings." The guidance relates principally to networks of angel investors; however, the guidance also notes that it continues to regard the determination of whether a communication constitutes a "general solicitation" as a fact-specific assessment. In its guidance, the Staff notes that "the greater the number of persons without financial experience, sophistication or any prior personal or business relationship with the issuer that are contacted by an issuer or persons acting on its behalf through impersonal, non-selective means of communication, the more likely the communications are part of a general solicitation."

How can an issuer or an agent acting on its behalf establish a substantive relationship with potential offerees prior to any offering? Can an entity other than the issuer or a registered broker-dealer establish a pre-existing substantive relationship?

Over the years, the Staff of the SEC has issued a number of no-action letters that have addressed the types of inquiries and activities that must be undertaken by a broker-dealer and also by a non-broker-dealer operator of an internet-based platform in order to establish a pre-existing substantive relationship. In its more recent guidance, issued in the form of C&DIs, as well as in a no-action letter, the SEC Staff largely restates its prior views. Citing to a 1985 no-action letter, a C&DI states that, "a 'pre-existing' relationship is one that the issuer has formed with an offeree prior to the commencement of the securities offering or, alternatively, that was established through either a registered broker-dealer or investment adviser prior to the registered broker-dealer or investment adviser participation in the offering." The Staff also notes that a registered investment adviser, acting on an issuer's behalf, may establish a pre-existing substantive relationship with potential offerees. In order for a relationship to be deemed "substantive" the issuer (or a person acting on its behalf) must have obtained sufficient information to evaluate, and must, in fact, evaluate, a prospective offeree's financial circumstances and sophistication, in order to determine the offeree's status. The Staff of the SEC also issued a no-action letter in which it passed upon certain methods used by a platform-based sponsor in order to establish a substantive relationship with potential investors in venture capital funds. The no-action letter is significant in that it extends the prior guidance relating to reliance by an issuer on the pre-existing relationship formed by

a broker-dealer with its clients to a registered investment adviser. Also, the letter makes clear that in order to establish a pre-existing substantive relationship, a registered person or other intermediary must not only obtain information about a prospective investor's financial sophistication and status, but it also must have the means to, and must, verify this information.

Source: *See* Compliance and Disclosure Interpretations, questions 256.29 to 256.32, Securities Act Rules, available at http://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm#256.23; Citizen VC, Inc. (Aug. 6, 2015), available at https://www.sec.gov/divisions/corpfin/cf-noaction/2015/citizen-vc-inc-080615-502.htm.

Website Content During Registration

What should a company do in connection with its web content before filing a registration statement?

Under the Securities Act, a company is prohibited from making a public offer of its securities before it files a registration statement, subject to certain exceptions. Under the federal securities laws, the term "offer" is defined broadly. *See "What Types of Website Content are 'Offers'?"* Companies should not post any information about an offering unless the type of information posted is consistent with Rule 135 under the Securities Act. It should be noted that WKSIs have greater flexibility with respect to communications or "offers" prior to the filing of a registration statement and, consequently, may have more flexibility with regard to website communications. Subject to certain terms and conditions, Rule 163 under the Securities Act allows a WKSI to make an offer through a free writing prospectus, which could include the posting of materials on a website, prior to the filing of a registration statement. Rule 433 under the Securities Act provides further guidance with respect to the offer of a company's securities on the company's website. Among other terms, the free writing prospectus must generally contain certain legends and a copy must be filed with the SEC.

Before filing a registration statement, to the extent a company has historical information posted on its website, it should confirm that the information is identified as such and posted in the appropriate section of the company's website. In addition, companies should ensure that their content does not "condition the market" (often referred to as "gun jumping").

Because impermissible communications in connection with an offering can have significant consequences for the company and offering participants, social media use should be subject to special controls by companies contemplating a public offering. In some cases, companies contemplating an initial public offering have stopped making postings on company-sponsored Twitter accounts. Ongoing monitoring of social media communications is necessary to avoid concerns that written offers are being made other than by means of a prospectus or other permitted communications. This means that company counsel or other appropriate company personnel should review all of the content on the company's websites, social media platforms and intranets (not just the IR web pages), as well as all sites belonging to its affiliates and strategic partners. All of these sites should be "scrubbed" so that any content that may possibly be deemed an "offer" or gun jumping is removed or revised. Note that the scrubbing itself

may signal the market that the company intends to offer securities, so the scrubbing should be as inconspicuous as possible. If anyone notices (which easily can be tracked with online "spiders" that report when web content is revised) and asks questions, it is prudent to follow a "no comment" policy.

Scrubbing web content should include removing all hyperlinks that relate to financial information, analysts' reports, or any information or communications that may be considered improper during an offering.

Title I of the Jumpstart Our Business Startups Act (the "JOBS Act"), titled "Reopening American Capital Markets to Emerging Growth Companies," establishes a new category of issuer, an "emerging growth company," for which certain disclosure and other requirements will be phased in over time following a company's initial public offering. The JOBS Act amends the Securities Act and the Exchange Act, to add a definition of an "emerging growth company." An emerging growth company is defined as: an issuer with total gross revenues of less than $1 billion (subject to inflationary adjustment by the SEC every five years) during its most recently completed fiscal year. A company remains an "emerging growth company" until the earliest of: (A) the last day of the fiscal year during which the issuer has total annual gross revenues in excess of a $1 billion (subject to inflationary indexing); (B) the last day of the issuer's fiscal year following the fifth anniversary of the date of the first sale of common equity securities of the issuer pursuant to an effective registration statement under the Securities Act; (C) the date on which such issuer has, during the prior three-year period, issued more than $1 billion in non-convertible debt; or (D) the date on which the issuer is deemed a "large accelerated filer." An issuer will not be able to qualify as an emerging growth company if it first sold its common stock in a registered offering prior to December 8, 2011.

An emerging growth company may submit a draft registration statement to the SEC for confidential nonpublic review prior to public filing, provided that the initial confidential submission and all amendments thereto shall be publicly filed with the SEC no later than 21 days prior to the issuer's commencement of a road show. Emerging growth companies may engage in oral or written communications with qualified institutional buyers, or QIBs, and institutional accredited investors (as defined in Rule 501 of the Securities Act) in order to gauge their interest in a proposed initial public offering either prior to or following the first filing of the registration statement. While these provisions provide increased flexibility around communications for emerging growth companies prior to and after filing a registration statement for an initial public offering, the requirement that communications only take place with QIBs and institutional accredited investors substantially limits the availability of more broadly accessible social media as a means for making any such communications.

Source: In the May 2000 Release, the SEC clarified that its guidance regarding which corporate communications can be made during the pre-filing and waiting periods applies equally to companies going public. *See also "How can a company avoid 'inadvertent' offers?"*

What should a company do in connection with its web content after filing a registration statement but before the registration statement is declared effective?

During the pre-effective period, a company should continue to ensure that historical information is posted in compliance with Rule 433 and that its web content, and that of its affiliates or strategic partners, does not "condition the market" or constitute "gun jumping." Only ongoing routine business communications should be posted. Preferably, such content should be in compliance with either of Rules 168, 169 or 433. Generally, a company may continue to advertise its products or services in a manner consistent with past practice.

No mention of the offering should be made other than in the form of a Section 10(a) prospectus or a tombstone ad type announcement since a company cannot make a "written" offer during this period. A company that posts a tombstone ad should ensure that it does not contain too much information. The SEC Staff strictly construes the information that can be included in tombstone ads and routinely looks at a company's website (and general online "presence") as part of its review process. Rules 134 and 135 under the Securities Act provide guidance as to the type of information that may be disclosed under various circumstances. Companies may expand the type of information they disclose to the public after the filing of a registration statement by including the information in a free writing prospectus and complying with applicable rules regarding the use of legends and the filing of a free writing prospectus with the SEC, among other terms and conditions. *See* Rules 164 and 433 under the Securities Act.

It is best not to modify a website in a dramatic manner until after the offering is closed. Any website facelifts during the waiting period may be deemed to be related to the offering and, accordingly, need to be justified as not being part of an effort to condition the market, which may be difficult to do. On the other hand, many companies continuously revise their web presence in the ordinary course of business. A historical pattern of frequent changes may support an argument that a revision during the waiting period is not conditioning the market, but the company should discuss its plans with the SEC Staff in advance, depending on the circumstances.

In the May 2000 Release, the SEC stated (*see* Section II(B)(2)) that a company going public that contemporaneously establishes a new website may have a problem. A company that establishes a new website may need to apply the guidance more strictly when evaluating web content since it does not have an established history of ordinary-course business communications, and the mere creation of a website may condition the market.

Can material from a website be incorporated by reference into a registration statement?

No. Certain registration statements allow materials from other SEC filings to be incorporated by reference. Incorporation by reference may apply to historical filings and/or to future filings, depending on the type of form. Such registration statements do not allow the registrant to incorporate materials by reference from other documents. This is an important concern for any company that has an effective registration statement and is relying on incorporation by reference to keep the related prospectus updated. Even if the company felt

comfortable that its website was "public" for purposes of Regulation FD, the company should still need to file Form 8-Ks to announce new information to make sure that the information is deemed part of the prospectus.

Analysts' Reports and Webcasts

Can a company be liable for an analyst's research report if it links to it?

It depends. A company can be liable under the securities laws for the content of an analyst's report under the "entanglement" theory if it had a sufficient level of pre-publication involvement in the preparation of the report. A company may also be liable under the securities laws under a post-publication adoption theory if the company endorses or approves the linked report, explicitly or implicitly. Lastly, if a company posts a link to only some of the analyst reports available, especially if linked reports are the only ones that are positive, then, absent other efforts, it may be inferred that the company has approved or endorsed the report and, hence, is liable for its contents. It is worth noting that most practitioners advise against links to analysts' reports. *See "Is a company liable for web content provided by a third party?"*

Should a company post analysts' conference call transcripts on its website?

Only if the appropriate disclaimer for written forward-looking information accompanies the forward-looking information in the transcript, since a transcript is a written communication.

Of course, a transcript makes it easier for the plaintiffs' bar to find materials to use against a company in connection with securities litigation, particularly if the transcript contains projections. The plaintiffs' bar reviews a company's websites closely to identify statements to cite in complaints.

Overall, companies have been reluctant to post transcripts of analysts' conference calls on their websites and very few have done so, probably due to these incremental risks compared to audio webcasts.

How can a company invoke the safe harbor for forward-looking information in webcast conference calls?

Companies should invoke the safe harbor for forward-looking information in webcasts as they would for any written communication.

A webcast that is broadcast live is deemed not to be a graphic communication. Accordingly, it may be deemed an oral communication under the PSLRA and should open with a verbal disclaimer. A webcast that is archived or otherwise made available after the live transmission is deemed a graphic communication and, therefore, a written communication under the securities laws. Most companies that broadcast their webcasts will also make archival copies of the webcast available. Accordingly, companies should be prepared to treat their webcasts as written communications. Note that disclaimers for forward-looking written statements should be longer and more detailed than disclaimers for oral forward-looking statements. In either case, meaningful cautionary language should accompany the forward-looking information in the webcasts, and companies should include an appropriate form of disclaimer for forward-looking statements.

It is a best practice to ensure that the disclaimers included in webcasts include factors that note how actual results may vary from the forward-looking

information in the Webcast and include meaningful cautionary language that "accompanies" the information.

How can a company invoke the safe harbor for forward-looking information for conference call slide shows or scripts posted on a website?

A company can invoke the safe harbor for forward-looking information in a conference call presentation by posting its form of legend on the slide show or script that is tailored to the applicable forward-looking information. Textual content on a website, including conference call slides or scripts, are graphic communications as defined in Rule 405 under the Securities Act, and, accordingly, are written communications, as defined in Rule 405 of the Securities Act. Accordingly, they are subject to the safe harbor for forward-looking statements.

If a script is posted on a company's website, the company should be careful to tailor the safe harbor to answers during the call's "Q&A." The script should not be posted until company counsel has had time to review the script after the call. Companies should archive or delete a script after a relatively short period of time to minimize the risk that outdated information is deemed "alive."

Note that it is unclear if a link to cautionary language satisfies the "accompany" requirement for the safe harbor for forward-looking statements.

Should a company list which analysts cover the company on its website?

A mere list of the analysts covering a particular company probably does not constitute entanglement. However, companies should avoid posting links to reports or posting actual reports on their websites, as doing so may be viewed as entanglement.

Selective listing by a company of only a number of the analysts that cover it may be viewed as misleading, especially if the analysts who are omitted did not favorably cover the company. If the list includes all applicable analysts, a disclaimer should accompany the list indicating that the company believes the list is complete, but that there are no assurances that the company did not miss any other covering analyst.

A disclaimer should also state that the company:

- does not review analysts' reports (or if a company does review them for factual accuracy, indicate that it does not review for substance); and
- does not endorse any analysts' reports.

The list should include the date it was created (although the company should try to keep the list updated) and indicate that it is a list of known analysts who have covered the company since a specified date (but also disclose that there is a possibility that other analysts cover the company).

The list may include each analyst's phone number or e-mail address. However, as a courtesy, companies may want to get permission from each analyst before posting such information.

Note that links to analyst reports can be problematic and should be avoided. *See "Can a company be liable for an analyst's research report if it links to it?"*

Should a company post or link to First Call consensus estimates?

Probably not. Although investors may find such information to be useful, it is the type of forward-

looking information that often is wrong and can expose the company to a lawsuit.

By posting these estimates, companies may encounter other problems. For example, a company may believe that a consensus estimate is wrong after having posted it on its website. A company may incur liability under a post-publication adoption theory or for selective disclosure if it attempts to have an analyst revise its estimates.

Rather than post the estimates on their websites, some companies merely link to First Call consensus estimates. If a company does provide such a link, it should post a disclaimer adjacent to the information or use an exit notice for a link and consider meeting the other factors in the SEC's link framework so that it does not inadvertently adopt the estimates. *See "What is the SEC's analytical framework to determine if companies are liable for third-party hyperlinked content?"*

By Anna T. Pinedo, Partner,

Morrison & Foerster LLP

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