

## Social Media Web Sites

### Guidance on Blogs and Social Networking Web Sites

#### Executive Summary

Americans are increasingly using social media Web sites, such as blogs and social networking sites, for business and personal communications. Firms have asked FINRA staff how the FINRA rules governing communications with the public apply to social media sites that are sponsored by a firm or its registered representatives. This *Notice* provides guidance to firms regarding these issues.

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#### Background

According to a recent report by the Pew Internet and American Life Project, 46 percent of American adults who use the Internet logged onto a social networking site in 2009, which is up from 8 percent in 2005.<sup>1</sup> Other studies have shown that use of social media sites by businesses to communicate with customers and the public has grown significantly in the past few years.<sup>2</sup>

FINRA has provided guidance concerning particular applications of the communications rules to interactive Web sites in the past. For example, in March 1999, FINRA stated that a registered representative's participation in an Internet chat room is subject to the same requirements as a presentation in person before a group of investors.<sup>3</sup> This guidance was codified in 2003, when FINRA defined the term "public appearance" in NASD Rule 2210 to include participation in an interactive electronic forum.<sup>4</sup>

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##### Notice Type

- Guidance

##### Suggested Routing

- Advertising
- Compliance
- Legal
- Operations
- Registered Representative
- Senior Management

##### Key Topics

- Blogs
- Communications with the Public
- Recordkeeping
- Social Networking Web Sites
- Supervision

##### Referenced Rules & Notices

- ICA Section 24(b)
- NASD Rule 2210
- NASD Rule 2310
- NASD Rule 2711
- NASD Rule 3010
- NASD Rule 3070
- NASD Rule 3110
- NYSE Rule 351
- NYSE Rule 401A
- NYSE Rule 410
- NYSE Rule 472
- NTM 01-23
- NTM 03-33
- Regulatory Notice 07-59
- Regulatory Notice 09-55
- SEA Rule 17a-3
- SEA Rule 17a-4
- Securities Act Rule 482

FINRA also has provided guidance regarding the application of the communication rules in its *Guide to the Internet for Registered Representatives*,<sup>5</sup> and has released podcasts on these issues to help educate firms and their personnel.<sup>6</sup> Nevertheless, FINRA staff has continued to receive numerous inquiries from firms and others concerning how the FINRA rules governing communications with the public apply to the use of social media sites by firms and their registered representatives. Firms also have inquired regarding their recordkeeping responsibilities for communications posted on social media sites.

In September 2009, FINRA organized a Social Networking Task Force composed of FINRA staff and industry representatives to discuss how firms and their registered representatives could use social media sites for legitimate business purposes in a manner that ensures investor protection. Based on input from the Task Force and others, and further staff consideration of these issues, FINRA is issuing this *Notice* to guide firms on applying the communications rules to social media sites, such as blogs and social networking sites. The goal of this *Notice* is to ensure that—as the use of social media sites increases over time—investors are protected from false or misleading claims and representations, and firms are able to effectively and appropriately supervise their associated persons' participation in these sites. At the same time, FINRA is seeking to interpret its rules in a flexible manner to allow firms to communicate with clients and investors using this new technology.

While many firms may find that the guidance in this *Notice* is useful when establishing their own procedures, each firm must develop policies and procedures that are best designed to ensure that the firm and its personnel comply with all applicable requirements. Every firm should consider the guidance provided by this *Notice* in the context of its own business and its compliance and supervisory programs.

This *Notice* only addresses the use by a firm or its personnel of social media sites for business purposes. The *Notice* does not purport to address the use by individuals of social media sites for purely personal reasons.

## Questions & Answers

### Recordkeeping Responsibilities

**Q1:** Are firms required to retain records of communications related to the broker-dealer's business that are made through social media sites?

**A1:** Yes. Every firm that intends to communicate, or permit its associated persons to communicate, through social media sites must first ensure that it can retain records of those communications as required by Rules 17a-3 and 17a-4 under the Securities Exchange Act of 1934 and NASD Rule 3110. SEC and FINRA rules require that for record retention purposes, the content of the communication is determinative and a broker-dealer must retain those electronic communications that relate to its "business as such."<sup>7</sup>

FINRA is aware that some technology providers are developing systems that are intended to enable firms to retain records of communications made through social media sites. Some systems might interface with a firm's network to capture social media participation and feed it into existing systems for the review and retention of email. Other providers are developing technology that might permit a registered representative working off-site to elect to access social media through platforms that will retain the communications on behalf of the firm.

Of course, it is up to each firm to determine whether any particular technology, system or program provides the retention and retrieval functions necessary to comply with the books and records rules. FINRA does not endorse any particular technology necessary to keep such records, nor is it certain that adequate technology currently exists.

### Suitability Responsibilities

**Q2:** If a firm or its personnel recommends a security through a social media site, does this trigger the requirements of NASD Rule 2310 regarding suitability?

**A2:** Yes. Whether a particular communication constitutes a "recommendation" for purposes of Rule 2310 will depend on the facts and circumstances of the communication. Firms should consult *Notice to Members (NTM) 01-23* (Online Suitability) for additional guidance concerning when an online communication falls within the definition of "recommendation" under Rule 2310.

Various social media sites include functions that make their content widely available or that limit access to one or more individuals. Rule 2310 requires a broker-dealer to determine that a recommendation is suitable for every investor to whom it is made.

**Q3:** What factors should firms consider when developing procedures for supervising interactive electronic communications on a social media site that recommend specific investment products?

**A3:** Communications that recommend specific investment products often present greater challenges for a firm's compliance program than other communications. As discussed above, they may trigger the FINRA suitability rule, thus creating possible substantive liability for the firm or a registered representative. These communications must often include additional disclosure in order to provide the customer with a sound basis for evaluating the facts with respect to the product. They also might trigger other requirements under the federal securities laws.<sup>8</sup> FINRA has brought disciplinary actions regarding interactive electronic communications that contained misleading statements about investment products that the communications recommended.<sup>9</sup>

For these reasons, firms must adopt policies and procedures reasonably designed to address communications that recommend specific investment products. As a best practice, firms should consider prohibiting all interactive electronic communications that recommend a specific investment product and any link to such a recommendation unless a registered principal has previously approved the content.

Alternatively, many firms maintain databases of previously approved communications and provide their personnel with routine access to these templates. Firms might consider prohibiting communications that recommend a specific investment product unless the communication conforms to a pre-approved template and the specific recommendation has been approved by a registered principal. Firms also should consider adopting policies and procedures governing communications that promote specific investment products, even if these communications might not constitute a "recommendation" for purposes of our suitability rule or otherwise.

### Types of Interactive Electronic Forums

The definition of "public appearance" in NASD Rule 2210 includes unscripted participation in an interactive electronic forum such as a chat room or online seminar. Rule 2210 does not require firms to have a registered principal approve in advance the extemporaneous remarks of personnel who participate in public appearances. However, these interactive electronic forums are subject to other supervisory requirements and to the content requirements of FINRA's communications rule.

- Q4:** Does a blog constitute an “interactive electronic forum” for purposes of Rule 2210?
- A4:** The treatment of a blog under Rule 2210 depends on the manner and purposes for which the blog has been constructed. Merriam-Webster’s Online Dictionary defines “blog” as “a Web site that contains an online personal journal with reflections, comments, and often hyperlinks provided by the writer.”<sup>10</sup> Historically, some blogs have consisted of static content posted by the blogger. FINRA considers static postings to constitute “advertisements” under Rule 2210. If a firm or its registered representative sponsors such a blog, it must obtain prior principal approval of any such posting. Today, however, many blogs enable users to engage in real-time interactive communications. If the blog is used to engage in real-time interactive communications, FINRA would consider the blog to be an interactive electronic forum that does not require prior principal approval; however, such communications must be supervised, as discussed below.<sup>11</sup>
- Q5:** Social networking sites, such as Facebook, Twitter and LinkedIn, typically include both static content and interactive functions. Are these sites interactive electronic forums for purposes of Rule 2210?
- A5:** Social networking sites typically contain both static and interactive content. The static content remains posted until it is changed by the firm or individual who established the account on the site. Generally, static content is accessible to all visitors to the site.

Examples of static content typically available through social networking sites include profile, background or wall information. As with other Web-based communications such as banner advertisements, a registered principal of the firm must approve all static content on a page of a social networking site established by the firm or a registered representative before it is posted.<sup>12</sup> Firms may use an electronic system to document these approvals.

Social networking sites also contain non-static, real-time communications, such as interactive posts on sites such as Twitter and Facebook. The portion of a social networking site that provides for these interactive communications constitutes an interactive electronic forum, and firms are not required to have a registered principal approve these communications prior to use. Of course, firms still must supervise these communications, as discussed below.

## Supervision of Social Media Sites

**Q6:** How must firms supervise interactive electronic communications by the firm or its registered representatives using blogs or social networking sites?

**A6:** The content provisions of FINRA's communications rules apply to interactive electronic communications that the firm or its personnel send through a social media site. While prior principal approval is not required under Rule 2210 for interactive electronic forums, firms must supervise these interactive electronic communications under NASD Rule 3010 in a manner reasonably designed to ensure that they do not violate the content requirements of FINRA's communications rules.<sup>13</sup>

Firms may adopt supervisory procedures similar to those outlined for electronic correspondence in *Regulatory Notice 07-59* (FINRA Guidance Regarding Review and Supervision of Electronic Communications). As set forth in that *Notice*, firms may employ risk-based principles to determine the extent to which the review of incoming, outgoing and internal electronic communications is necessary for the proper supervision of their business.

For example, firms may adopt procedures that require principal review of some or all interactive electronic communications prior to use or may adopt various methods of post-use review, including sampling and lexicon-based search methodologies as discussed in *Regulatory Notice 07-59*. We are aware that technology providers are developing or may have developed systems that are intended to address both the books and records rules and supervisory procedures for social media sites that are similar or equivalent to those currently in use for emails and other electronic communications. FINRA does not endorse any particular technology. Whatever procedures firms adopt, however, must be reasonably designed to ensure that interactive electronic communications do not violate FINRA or SEC rules.

Firms are also reminded that they must have policies and procedures, as described in *Regulatory Notice 07-59*, for the review by a supervisor of employees' incoming, outgoing and internal electronic communications that are of a specific subject matter that require review under FINRA rules and federal securities laws, including:

- ▶ NASD Rule 2711(b)(3)(A) and NYSE Rule 472(b)(3), which require that a firm's legal and compliance department be copied on communications between non-research and research departments concerning the content of a research report;
- ▶ NASD Rule 3070(c) and NYSE Rule 351(d), which require the identification and reporting of customer complaints; NYSE Rule 401A requires that the receipt of each complaint be acknowledged by the firm to the customer within 15 business days; and

- NASD Rule 3110(j) and NYSE Rule 410, which require the identification and prior written approval of every order error and other account designation change.

**Q7:** What restrictions should firms place on which personnel may establish an account with a social media site?

**A7:** Firms must adopt policies and procedures reasonably designed to ensure that their associated persons who participate in social media sites for business purposes are appropriately supervised, have the necessary training and background to engage in such activities, and do not present undue risks to investors. Firms must have a general policy prohibiting any associated person from engaging in business communications in a social media site that is not subject to the firm's supervision. Firms also must require that only those associated persons who have received appropriate training on the firm's policies and procedures regarding interactive electronic communications may engage in such communications.

As firms develop their policies, they should consider prohibiting or placing restrictions on any associated person who has presented compliance risks in the past, particularly compliance risks concerning sales practices, from establishing accounts for business purposes with a social media site. In its supervision of social networking sites, each firm must monitor the extent to which associated persons are complying with the firm's policies and procedures governing the use of these sites. Firms also should consider policies that address associated persons' continued use of such sites if the firm's supervisory systems demonstrate compliance risks. Firms should take disciplinary action if the firm's policies are violated.

### Third-Party Posts

**Q8:** If a customer or other third party posts content on a social media site established by the firm or its personnel, does FINRA consider the third-party content to be the firm's communication with the public under Rule 2210?

**A8:** As a general matter, FINRA does not treat posts by customers or other third parties as the firm's communication with the public subject to Rule 2210. Thus, the prior principal approval, content and filing requirements of Rule 2210 do not apply to these posts.

Under certain circumstances, however, third-party posts may become attributable to the firm. Whether third-party content is attributable to a firm depends on whether the firm has (1) involved itself in the preparation of the content or (2) explicitly or implicitly endorsed or approved the content.

The SEC has referred to circumstance (1) above as the “entanglement” theory (*i.e.*, the firm or its personnel is entangled with the preparation of the third-party post) and (2) as the “adoption” theory (*i.e.*, the firm or its personnel has adopted its content).<sup>14</sup> Although the SEC has employed these theories as a basis for a company’s responsibility for third-party information that is hyperlinked to its Web site, a similar analysis would apply to third-party posts on a social media site established by the firm or its personnel.

For example, FINRA would consider such a third-party post to be a communication with the public by the firm or its personnel under the entanglement theory if the firm or its personnel paid for or otherwise was involved with the preparation of the content prior to posting. FINRA also would consider a third-party post to be a communication with the public by the firm or its personnel under the adoption theory if, after the content is posted, the firm or its personnel explicitly or implicitly endorses or approves the post.<sup>15</sup>

**Q9:** Must a firm also use a disclaimer to inform customers that third-party posts do not reflect the views of the firm and have not been reviewed by the firm for completeness or accuracy?

**A9:** Assuming the disclaimer was sufficiently prominent to inform investors of the firm’s position, such a disclaimer would be part of the facts and circumstances that FINRA would consider in an analysis of whether a firm had adopted or become entangled with a posting.

**Q10:** Must a firm monitor third-party posts?

**A10:** FINRA does not consider a third-party post to be a firm communication with the public unless the firm or its personnel either is entangled with the preparation of the third-party post or has adopted its content. Nevertheless, FINRA has found through its discussions with members of the Social Networking Task Force and others that many firms monitor third-party posts on firm Web sites. For example, some firms monitor third-party posts to mitigate the perception that the firm is adopting a third-party post, to address copyright issues or to assist compliance with the “Good Samaritan” safe harbor for blocking and screening offensive material under the Communications Decency Act.<sup>16</sup>

Some of the other best practices adopted by Task Force members include:

- ▶ establishing appropriate usage guidelines for customers and other third parties that are permitted to post on firm-sponsored Web sites;
- ▶ establishing processes for screening third-party content based on the expected usage and frequency of third-party posts; and
- ▶ disclosing firm policies regarding its responsibility for third-party posts.



## Endnotes

- 1 See Amanda Lenhart, Pew Internet and American Life Project, *The Democratization of Online Social Networks* (Oct. 8, 2009), <http://fe01.pewinternet.org/Presentations/2009/41--The-Democratization-of-Online-Social-Networks.aspx>.
- 2 Sharon Gaudin, *Business Use of Facebook, Twitter Exploding*, Computerworld (Nov. 9, 2009), at [www.computerworld.com/s/article/9140579/Business\\_use\\_of\\_Twitter\\_Facebook\\_exploding](http://www.computerworld.com/s/article/9140579/Business_use_of_Twitter_Facebook_exploding).
- 3 See “Ask the Analyst – Electronic Communications,” NASD Regulation, *Regulatory & Compliance Alert* (Mar. 1999) (“March 1999 Ask the Analyst”).
- 4 See NASD Rule 2210(a)(5).
- 5 See *Guide to the Internet for Registered Representatives*, at [www.finra.org/Industry/Issues/Advertising/p006118](http://www.finra.org/Industry/Issues/Advertising/p006118).
- 6 See “Electronic Communications: Blogs, Bulletin Boards and Chat Rooms” (Feb. 23, 2009), and “Electronic Communications: Social Networking Web Sites” (Mar. 10, 2009) at [www.finra.org/podcasts](http://www.finra.org/podcasts).  
  
FINRA is also hosting webinars on compliance considerations for social networking sites on February 3 and March 17, 2010. Find more information at [www.finra.org/webinars](http://www.finra.org/webinars).
- 7 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).
- 8 For example, even if FINRA considers a communication made through an interactive electronic forum to be a public appearance, the SEC staff could still conclude that Rule 482 under the Securities Act of 1933 and the filing requirements of Section 24(b) of the Investment Company Act of 1940 apply to the communication. Accordingly, firms must consider these requirements in determining whether to permit interactive electronic communications that discuss registered investment companies.
- 9 For example, in a Default Decision dated November 23, 2009, FINRA fined and suspended a registered principal who held put options for himself and issued unapproved bulletin board messages that urged investors to sell the underlying stock. The bulletin board messages omitted material disclosure regarding his interest in the stock.
- 10 Merriam-Webster’s Online Dictionary, definition of “blog,” at <http://www.merriam-webster.com/dictionary/BLOG>.
- 11 The key to this distinction between whether a blog is considered an advertisement versus an interactive electronic forum is whether it is used to engage in real-time interactive communications with third parties. Thus, 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.
- 12 Currently, NASD Rule 2210(b) requires that a registered principal of a firm approve all advertisements and sales literature prior to use either electronically or in writing. FINRA has proposed amendments to this rule. These amendments would retain this prior to use principal approval requirement for “retail communications” as defined in the proposal. See *Regulatory Notice 09-55* (Sept. 2009).

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## Endnotes Continued

- 13 See, e.g., March 1999 Ask the Analyst, *supra* note 3.
- 14 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) (“2008 SEC Release”); *Use of Electronic Media*, SEC Rel. No. 33-7856 (April 28, 2000), 65 Fed. Reg. 25843, 25848-25849 (May 4, 2000).
- 15 See 2008 SEC Release, *supra* note 14, 65 Fed. Reg. 45870 n.78.
- 16 See 47 U.S.C. § 230(c).