

# Regulatory Rules

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## FINRA and SEC Compliance in the Use of Social Media

By Barry Goldsmith and K. Susan Grafton

**S**ocial media comes into play at many stages of a conference or program. When the meeting is hosted by a broker-dealer, or involves speakers from broker-dealers, care must be taken to comply with the Financial Industry Regulatory Authority's (FINRA) rules applicable to communications with the public, and the Securities and Exchange Commission's (SEC) books and records requirements. The time to address these issues is at the planning stage to be sure that FINRA and SEC requirements are taken into account early on and that disruptive or costly changes to the event are not required later on.

**1 Use of social media to market a conference.** If social media is used to market a conference, care will need to be taken to comply with FINRA's rules relating to communications with the public. In particular, NASD Rule 2210(b)(2) requires the retention of all advertisements, sales literature and independently prepared reprints; NASD Rule 2211(b)(2) requires the retention of institutional sales material; and NASD Rule 3010(d)(3) requires the retention of correspondence of registered representatives.

In the case of a client conference hosted by a broker-dealer, generally all communications, whether through social media or otherwise, will likely need to be pre-approved and reviewed, as discussed more fully below. Even in the case of third-party sponsored conferences, however, certain communications may be viewed as business communications of the firm. This could be the case if, for example, speaker biographies for personnel or other information includes descriptions of products or services offered by the firm.

If a broker-dealer co-sponsors a conference with a third party and places its logo on the third party's site, such co-branding could result in

FINRA holding the broker-dealer to be responsible for the entire content of the third party's site if the firm is viewed as having adopted or become entangled with its site. Similarly, if a third party advertises a conference or seminar on the broker-dealer's website, FINRA will view the firm as having adopted the content if the firm or its personnel explicitly or implicitly endorse or approve the post. Notwithstanding the above, a broker-dealer may link to the website of a third-party conference sponsor without assuming responsibility for the content of that site if the broker-dealer does not (a) "adopt" or become "entangled" with the content of the third-party site; and (b) know or have reason to know that the site contains false or misleading information.

**2 Use of social media as part of presentations — supervisory approval.** Before broker-dealer personnel use social media for business communications, a registered principal of the firm should approve use of the site based on a determination that such use can and will comply with all applicable FINRA rules, the federal securities laws and rules, including the SEC's record-keeping requirements, and the firm's own policies and procedures. In some cases, broker-dealers simply prohibit the use of social media by their personnel for business purposes.

The use of social media can be an issue in the case of a conference or other program that includes an interactive session via social media. In such cases, the firm's participating personnel will need to take care in responding to questions that could be viewed as prompting a business-related communication, such as responding to a question about a security or trading strategy. Moreover, if the firm's social media policy prohibits the use of



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social media for business purposes, the person should not respond substantively to the question.

**3 Static communications.** A static posting on social media is viewed as an advertisement under FINRA's rules. In particular, NASD Rule 2210(1)(b) requires a registered principal to approve each advertisement and piece of sales literature before the earlier of its use or filing with FINRA's Advertising Regulation Department. Any conference-related material that is posted on a social media site must be pre-approved by a registered principal of the firm, including approval of any items that were materially changed since their approval in an earlier version.

**4 Retention requirements.** If information communicated via social media is a communication of a broker-dealer, the firm will be required to retain a copy of such communication pursuant to Rule 17a-4(b)(4) under the Securities Exchange Act of 1934. The broker-dealer will be required to maintain a record of such communication for at least three years, the first two years in an easily accessible place.

**5 Training.** As part of its regular training program, broker-dealers should include education regarding its communications policies, including how they apply to social media and participation in conferences and other public meetings. Among other things, personnel who participate in public meetings and conferences should be trained about the type of information that they may communicate (e.g., no confidential information about customers or proprietary information of the firm) and what to do if they receive inappropriate information (e.g., if an officer of a public company inadvertently discloses material non-public information).

Firms may wish to use spot-checks to confirm

that personnel who participate in conferences are obtaining appropriate approvals; and put in place policies and procedures regarding participation in conferences and what approvals must be obtained beforehand.

Key regulatory guidance on the use of social media can be found in FINRA's Regulatory Notice 11-39 (August 2011), available at [http://www.finra.org/web/groups/industry/@ip/@reg/@notice/](http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p124186.pdf)

The use of social media can be an issue in a conference that includes an interactive session via social media.

[documents/notices/p124186.pdf](http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p124186.pdf), and Regulatory Notice 10-06 (January 2010), available at <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p120779.pdf>. **I&FMM**

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