CARLTON FIELDS

FINRA Issues New Guidance on Social Media and Digital Communications

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In April, FINRA issued Regulatory Notice 17-18, which reiterates previous rules and provides additional guidance regarding the application of several key rules governing communications with the public to digital communications. It is intended to supplement, rather than alter, previous FINRA Regulatory Notices 10-06 and 11-39, as well as the February 2013 amendments to Rule 2210 and the December 2014 Retrospective Rule Review Report. The new guidance recalled many principles from past guidance and also contained several question-and-answer clarifications as to the interpretations of previous rules. For example, FINRA recalled past guidance regarding recordkeeping, such as Regulatory Notice 11-39, which notes that whether a communication must be retained depends on its content and not on the type of device or technology used in its transmittal. Further, regarding third-party posts, the new guidance restates language from Regulatory Notice 10-06, which holds that, generally, 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, unless the firm or an associated person has either (1) paid for or been involved in the content's preparation (which FINRA would deem "entanglement") or (2) explicitly or implicitly endorsed or approved the content (which FINRA would deem "adoption"). Additionally, regarding hyperlinks to third-party sites, the new guidance reiterated that Regulatory Notice 11-39 requires that a firm not establish a link to any third-party site that the firm knows or has reason to know contains false or misleading content. The question-and-answer clarifications provide additional advice pertaining to several common issues firms face when interpreting these rules under topics such as hyperlinks and sharing, testimonials, native advertising, and text messaging.

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