CARLTON FIELDS

FINRA Atwitter Over Social Media Influencers

Expect Focus

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Social media influencers are individuals, sometimes celebrities, who help businesses gain customers through social media communications. Influencers may communicate, for example, on TikTok, Facebook, Instagram, YouTube, Twitter, Stocktwits, Reddit, Twitch, and many other platforms, about a business or a product to influence the purchase decisions of potential customers.

In the heavily regulated securities industry, using influencers to acquire customers may raise regulatory issues, including receipt of referral fees and privacy.

On September 16, 2021, FINRA issued a targeted examination letter to member firms asking whether firms use influencers to acquire customers, and if they do, how firms compensate influencers and what firms do with customer data.

FINRA's letter requested documents, including, among others:

- Engagement letters, contracts, and agreements in which the firm contracted with influencers to provide social media communications for compensation.
- Copies of all social media communications influencers posted about the firm, and whether the social media communications were filed with FINRA's Advertising Regulation Department.
- Written supervisory procedures, compliance policies, and training materials regarding the use of social media influencers.
- A list of all unaffiliated third parties with whom the firm shared nonpublic personal information about a customer's usage of the firm's website or mobile application.

As to referral fees, FINRA asked whether the firm or an affiliate offered a referral program through which individuals received bonuses, rewards, incentives, or other compensation for referring new customers to open accounts at the firm. FINRA requested information on compensation, benefits, or bonuses offered through referral programs, including how such amounts are determined, presumably to evaluate whether influencers receive transaction-based securities compensation.

As to consumer privacy, FINRA requested information on firms' compliance with SEC Regulation S-P concerning the collection of data generated by a website or mobile application about a user and then saved (known as cookies). Specifically, FINRA sought information on cookies obtained from customers, or individuals who provided nonpublic personal information but were not onboarded as customers, the firm's privacy policies and opt-out notices, and related compliance procedures.

Time will tell whether FINRA's targeted examination findings will lead to enforcement action and/or guidance concerning influencers in the securities industry.

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