

Looking Ahead:

- (i) Supervising Digital Communications in a World of Emerging Technology; and
- (ii) Developments in the FINRA Arbitration Forum

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Social Media and Digital Communications

- Facebook
- Facebook Messenger
- LinkedIn
- LinkedIn Messenger
- Twitter
- Pod Casts
- Blogs
- Chat Rooms
- **PERSONAL DEVICE TEXT MESSAGING**

Text Messaging Statistics

- Text messaging the most widely-used smartphone feature
- 97% of smartphone users in a week-long study used text messaging
- Texts are transmitted at a rate of 200,000 messages per second

FINRA's Focus and Guidance

- September 2009
 - FINRA Social Networking Task Force: How firms can comply with FINRA Rules when communicating through **social** networks
- January 2010
 - Notice to Members 10-06: Guidance on Blogs and Social Networking Web Sites
- August 2011
 - Notice to Members 11-39: Social Media Websites and the Use of Personal Devices for Business Communications

FINRA's Focus and Guidance

Cont'd.

- FINRA Priorities Letter, 2017
- April 2017
 - Notice to Members 17-18: Social Media and Digital Communications

Applicable FINRA Rules

- Communications with Public Must be Fair and Not Misleading
 - FINRA Rule 2210(d)(1)(A)
- What is a “Communication”?
 - FINRA Rule 2210(1): Correspondence, retail communications and institutional communications

Applicable FINRA Rules

- What is “Correspondence”?
 - FINRA Rule 2210(2): Any written (including electronic) communication that is distributed or made available to 25 or fewer retail investors within any 30 calendar-day period
- What is a “Retail Communication”?
 - FINRA Rule 2210(5): Any written (including electronic) communication that is distributed or made available to more than 25 retail investors within any 30 calendar-day period

FINRA Rule 3110

- “Supervision”: Firms must establish and maintain systems to supervise the activities of associated persons
 - Includes reviewing correspondence and communications to ensure they are fair and not misleading
 - Includes text messages
 - Includes communications by the firm and/or associated person on social media sites
 - Includes content on third-party sites for which the firm has provided a “link”

Supervision of Communications by Social Media or Messaging

- Register representative use of blogs or social networking sites
- Interactive vs. Static Content
- Accessing Social Media Sites from personal devices
- Text Messaging
- Technology that automatically erases or deletes content
- Firm arrange for comments or posts by an “influencer”

FINRA Suggests Certain Adoptive Measures for Supervising Social Media Communications

- Training and Education of Associated Persons on Social Media and Electronic Communication Policies
- Follow up on “Red Flags” That Indicate Non-compliance
- Random Spot-Checking of Websites
- Require Certification of Compliance with Social Media and Electronic Communication Policies
- Prohibit Associated Persons with Prior Compliance Concerns From Publishing Social Media Sites

Social Media and Electronic Communications: Recordkeeping

- Securities Exchange Act of 1934, Rule 17a-4(b):
- Firm Policies and Procedures, must include:
 - Method of recording all communications related to firm business made through any social media sites
 - Various technology systems available to capture social media interactions

Social Media and Electronic Communications: Recordkeeping

Cont'd.

- Training and education on difference between business and non-business communications
- Methods to retain, retrieve and supervise all communications related to the firm's "business as such"
- Retention of both static and interactive content

Recent FINRA Disciplinary Actions against Firms

- FINRA Complaint No. 2010025087302: FINRA affirms \$30,000 in fines and a 2-month suspension against a CCO responsible for reviewing electronic communications at a member firm. CCO failed to establish reasonable supervisory system for reviewing electronic correspondence, and failed to actually review any Bloomberg messages. Smarsh system revealed CCO did not review Smarsh reports often enough
- AWC No. 2015043279401: Firm failed to establish supervisory system for review of electronic communications, violating Rule 3110. Specifically failed to review AOL instant messaging accounts used by reps to conduct business. Censure and \$32,500 fine
- AWC No. 2015043383901: Firm failed to review the electronic communications it captured for several years, which also violated their own policies. Censure and \$12,500 fine
- AWC 2015043313001: Over 13 month period firm failed to review approximately 3.1 million emails and Bloomberg messages used to communicate internally and with clients. Censure and \$125,000 fine
- AWC 2014041947501: Firm failed to maintain supervisory system regarding website retail communications, which were entangled with exaggerated, unbalanced and promissory research reports by links on website. Cites NTM 11-39; Censure and \$120,000 fine

Recent FINRA Disciplinary Actions Against Registered Representatives

- AWC No. 2015048070901, July 25, 2017: AP sent 58 texts re securities and investment strategies to 16 customers, not captured by firm; violated firm policies.
 - 30 day suspension, \$5,000 fine
- AWC No. 2016048603001, December 9, 2016: AP communicated with two customers about securities over text which firm did not capture; also conducted unauthorized trades.
 - 30 day suspension, \$5,000 fine
- AWC No. 2015048067801, October 31, 2016: AP used unmonitored smartphone to text customers, also accepted personal loan from customer.
 - 30 day suspension, \$7,500 fine

Recent FINRA Disciplinary Actions Against Register Representatives

Cont'd.

- AWC No. 2015048357001, September 8, 2016: AP texted customers and used non-monitored email address to conduct business; communications unsupervised.
 - 60 day suspension, \$7,500 fine
- AWC No. 2016050129701, June 23, 2016: Despite attestation to the contrary, AP texted customers about business, violating firm policies. Communications not captured by firm. Also received improper compensation and recommended unsuitable transaction.
 - Barred from association with any Member Firm

Other Tech in FINRA's Focus

- FINRA's policy on bulk data access to Brokercheck
- FINRA's watching FinTech developments in the securities industry

Customer Claims Involving Digital Communications with the Rep

- Investigation of modes of communication between customer and rep
 - Rep's personal device
- Firm's policies and procedures on digital communications
- Discovery
- Implications if conduct violated firm's policies and procedures

Developments In The FINRA Arbitration Forum: Arbitrators

- Increased Number of Public Arbitrators for Ranking, effective January 3, 2017
 - FINRA Rule 12403, amended in December 2016, increases number of Public Arbitrators from 10 to 15 and increases number of strikes from four to six
- Broadening Eligibility for Public Chairperson, Effective January 9, 2017

Developments In The FINRA Arbitration Forum: Arbitrators

Cont'd.

- Expedited List Selection, Effective September 18, 2017
 - Amended FINRA Rules 12402(c), 12403(b) and 13403(c): FINRA will send arbitrator ranking lists to all parties approximately 30 days after *original* answer deadline, regardless of extension(s)

Other Developments in FINRA Arbitration

- Required Use of the Party Portal, Effective April 3, 2017
- FINRA Dispute Resolution Issues Status Report on Arbitration Task Force Recommendations