On July 27, 2011, Butch Davis was fired as the University of North Carolina (UNC) football coach, ending a year of speculation about his job security. The timing of the action stunned many in the Carolina community. Citing the reputational damage the University had sustained due to alleged NCAA infractions, the Chancellor said it was time to start anew. Rewind to a year earlier—an All-American defensive tackle “tweets” that he is at a party in Miami, Florida. An NCAA investigation ensued which uncovered ties to agents, academic infractions, and ultimately, the dismissal of UNC’s head football coach. UNC’s story should be a cautionary tale for any organization whose individuals use social media. In the case of UNC, the medium was Twitter. This vignette reflects the realities of the world being shaped by the revolution in communication driven in large part by the emergence of social media. As the types and usage of social media continue to expand, so too will rules guiding its use.

Social media generally includes any means of electronic communications through various conduits, such as websites and microblogs (blogs), through which information, pictures, videos and other content can be shared. Some social media sites, such as Twitter, allow users to “tweet,” that is, post information about any topic of their choosing to a website for “followers” to read. Other social media sites such as Facebook and LinkedIn allow users to post

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“status updates” about their lives. Social media facilitates communication among friends, families and business colleagues. According to a recent study performed by the Pew Internet & American Life Project, a project of the Pew Research Center, over half of all adults nationwide now use social media.5

Social media use is not limited to individuals. Companies have joined in as a means of reaching potential customers. The financial industry is no exception. For example, in August 2011, Morgan Stanley launched an initiative in which several hundred brokers began using Twitter and LinkedIn.6 And in November 2011, Raymond James issued a press release stating it was partnering with Actiance to provide its financial advisors with social media tools to engage with clients.7 However, and perhaps predictably, compliance is playing catch-up with business practices.

As social media use has increased in the financial services industry, regulators have sought to ensure its use is consistent with applicable rules. The U.S. Securities and Exchange Commission (SEC) has offered guidance on electronic communications and websites in connection with certain SEC rules (discussed below), but has not yet specifically provided instruction on social media. The Financial Industry Regulatory Authority (FINRA) has issued several Regulatory Notices addressing member firms’ social media use.

This article will summarize relevant positions that have been taken by the SEC and FINRA that impact social media use in the financial sector.8

The SEC’s Take on Social Media

The SEC has not issued guidance specifically focused on social media use. Rather, it has indirectly addressed social media use through various rulemakings and releases, as well as the roll-out of several “investor tools.”

Regulation FD

With the issuance of Regulation FD (Reg FD), the SEC sought to address concerns of selective disclosure by issuers or persons acting on their behalf. Generally, when an issuer, or any person acting on its behalf, discloses material, non-public information to one or more persons specified in Reg FD, then the issuer is required to make “public” that information, simultaneously if the disclosure was intentional and promptly if non-intentional.9 The issuer may elect to make the information public by filing it on Form 8-K or via another method “reasonably designed to provide broad, non-exclusionary distribution of the information to the public.”10 Reg FD only applies to disclosures made by the issuer or those acting on its behalf, which are defined as senior officials, or other officers, employees, or agents who regularly communicate with the persons enumerated in Reg FD or with shareholders.11

The increased use of social media raises an important Reg FD question: Does disclosure through social media constitute “public” information or does using social media result in selective disclosure, which then requires subsequent disclosure on Form 8-K or other means?

In 2008, the SEC issued a Release entitled, “Commission Guidance on the Use of Company Web Sites” to provide guidance on the use of websites.12 In the 2008 Release, the SEC stated that when determining whether information is “public” for Reg FD purposes, it will consider the following factors:

(1) Whether an issuer’s website is a “recognized channel of distribution”;
(2) Whether information posted on a website “disseminates information in a manner making it available to the securities marketplace in general”; and
(3) If a “reasonable waiting period” has passed for investors and the markets to react to the information.13

If posted information is deemed “public,” subsequent disclosure is not required. Conversely, if a selective disclosure of material, non-public information is made, the corollary question is whether posting such information on a website satisfies the required disclosure requirement. The 2008 Release notes that in some circumstances, an issuer posting information on its website would satisfy the disclosure requirement.14 The issuer, of
course, must assess whether a website posting would meet the simultaneous or prompt timing requirements for public disclosure. Thus, issuers using social media websites must consider the implications of Reg FD prior to posting information on a social media site. In addition to Reg FD issues, issuers should consider whether disseminating information via social media might subject the issuer, or those acting on its behalf, to insider trading claims. However, to date, the SEC has not specifically addressed this question.

Securities Offerings

In the 2008 Release, the SEC stated that it has “long recognized the vital role” the Internet and other electronic communications play in disclosure under the federal securities laws. In addressing issues under the Securities Exchange Act of 1934 (the Exchange Act), the SEC stated that it has “encouraged delivery in electronic format” of documents required under the federal securities laws. Furthermore, it has, depending on the circumstance, allowed website postings to supplement, serve as an alternative to, or serve as a stand-alone method of providing information independent of EDGAR. The 2005 Securities Offering Reform also exhibited the SEC’s willingness to use electronic means of communication, as the SEC stated that an offer of securities posted on an issuer’s website, or which is accessible via hyperlink to a third-party website is an offer and would be considered a Free Writing Prospectus under Rule 433(c). Thus, issuers should be mindful of whether communications via social media, such as Facebook or Twitter, constitute “offers” under the federal securities laws.

Delivery presents a unique question in the context of social media. Where delivery of a document (a prospectus, for example) is required by law, can social media serve as an appropriate medium for delivery? In a series of interpretive releases, the SEC confirmed that delivery via electronic means is permissible as long as it meets the following three requirements: (1) notice, (2) access, and (3) evidence of delivery. “Notice” essentially means informing an investor that a new or updated prospectus will be delivered electronically. “Access” refers to the ability of the investor to locate easily and read the prospectus. “Evidence of delivery” is evidence that the investor actually receives the electronic prospectus.

The third element, in particular, may be the most problematic for issuers who wish to deliver documents via social media. In the 1995 Release, the SEC stated that an issuer could show reasonable evidence of delivery by “obtaining informed consent from an investor to receive the information through a particular electronic medium, coupled with assuring notice and access.” Generally, informed consent means that the recipient agrees, after specified notice and access is given, to accept electronic delivery of a document, instead of a paper copy. Under the SEC guidance, informed consent may be given by telephone or in writing, such as checking a box on an application or by signing a separate consent form. Investors may give informed consent directly to an issuer, or to market intermediaries, and an issuer may rely on consents given to those market intermediaries (and vice versa). However, an issuer must have procedures in place to ensure the authenticity of any form of consent accepted. Consent may be global, meaning it may apply to all documents of a particular issuer. Furthermore, consent need not identify the issuers covered by the consent. In the context of social media, it seems at least arguable that informed consent may be given, for example, via email on an issuer’s Facebook page.

Private Securities Offerings

Social media use could raise concerns for issuers making offerings pursuant to Regulation D (Reg D) of the Securities Act of 1933 (the 1933 Act). Reg D provides a safe harbor exemption from registration for securities offerings that meet certain requirements set forth in Reg D. Most relevant for this discussion, all private offerings made in reliance on Reg D utilizing Rule 506 must comply with Rule 502(c) of Reg D, which prohibits an issuer (or any person acting on its behalf) from offering or selling securities by any form of general solicitation or general advertising. Specifically, Rule 502(c) of Reg D provides
that neither the issuer nor any person acting on its behalf shall offer or sell exempted securities by any form of general solicitation or general advertising, including, but not limited to, the following:

(1) Any advertisement, article, notice or other communication published in any newspaper, magazine or similar media or broadcast over television or radio; and
(2) Any seminar or meeting whose attendees have been invited by general solicitation or advertising.\(^{32}\)

The 1995 Release provides an example of an issuer offering its securities pursuant to Reg D placing its offering materials on the company website. The SEC said that this would constitute a general solicitation.\(^{33}\)

In the 2000 Release, the SEC expressed concern that issuers of private placements were using the Internet in ways that might contravene Reg D. Specifically, the 2000 Release noted that issuers were using non-affiliated third-party websites that allowed prospective investors to qualify as accredited investors, either through questionnaires or simply checking a box, and observed that such practices deviated from prior SEC guidance.\(^ {34}\) The SEC reminded issuers that the safe harbor of Reg D is predicated on a “pre-existing, substantive relationship.”\(^ {35}\) Issuers should also be mindful of posting information about private funds on social media sites or engaging in communications about private placements via interactive sites such as Facebook or Twitter. Discussing private placements in such a forum, absent previously establishing a pre-existing substantive relationship with the conversant, could result in the issuer foregoing its ability to rely on Reg D.

**Proxies**

The SEC has said that participation in electronic forums could potentially constitute a solicitation under the proxy rules.\(^ {36}\) Rules under Section 14(a) of the Exchange Act set forth considerations for proxy solicitations for non-exempt securities registered under Section 12 of the Exchange Act.\(^ {37}\) Specifically, under Rule 14a-3,\(^ {38}\) no proxy solicitation shall be made unless a proxy statement, in the form described in Exchange Act rules, is concurrently or has been previously furnished. A “communication to security holders under certain circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy” constitutes a solicitation.\(^ {39}\) Thus, issuers should recognize that communications via social media could be deemed to be a “solicitation” resulting in the application of Section 14(a) proxy rules. The SEC, itself mindful of this issue, amended the proxy rules in 2008 to exempt certain communications in electronic forums from the proxy rules.\(^ {40}\) Specifically, Rule 14a-2(b)(6) states the proxy rules generally do not apply to solicitations provided that the solicitation is made sixty days prior the date announced for the issuer’s next annual or special shareholder meeting.\(^ {41}\) Indeed, in issuing this exemption, the SEC said its purpose was to “facilitate experimentation, innovation, and greater use of the Internet to further shareholder communications.”\(^ {42}\) Thus, issuers may establish electronic forums for shareholder interaction. As further protection, issuers are not liable under the federal securities laws for any statement or information provided by a third-party.\(^ {43}\) However, the antifraud laws still apply to any posting.\(^ {44}\)

**Hyperlinks**

The ability to hyperlink from one website to another raises the question of whether an issuer using a social media site can be held liable for content on a third-party site that has a hyperlink from the owner’s site. The SEC, addressing this issue in the 2000 Release, stated that third-party information to which an issuer has established a hyperlink can be attributed to the issuer under the “entanglement” theory or the “adoption” theory.\(^ {45}\) The entanglement theory asks whether the issuer is involved in the pre-publication preparation of the information on the third-party site.\(^ {46}\) The adoption theory asks whether the issuer explicitly or implicitly endorses or approves the information on the third-party site.\(^ {47}\) In considering whether a company has adopted hyperlinked information, the SEC will consider factors including context, risk of
confusing investors, and the presentation of the hyperlink.\textsuperscript{48} According to the SEC, the key question is: “Does the context of the hyperlink and the hyperlinked information together create a reasonable inference that the company has approved or endorsed the hyperlinked information?”\textsuperscript{49}

Hyperlinked information can pose serious consequences for companies under the federal antifraud rules. Under Exchange Act Section 10(b) and Rule 10b-5 a company can be held liable for hyperlinked information.\textsuperscript{50} Additionally, investment advisers and broker-dealers should take care before posting hyperlinks.\textsuperscript{51} In addition to the antifraud rules under the Exchange Act, investment advisers are subject to the antifraud rules under the Investment Advisers Act of 1940 (Advisers Act), including the prohibition on testimonial.\textsuperscript{52}

**Blogs, Chat Rooms and Interactive Sites**

In addition to guidance on interactive electronic shareholder forums for proxy purposes in the 2008 E-Forums Release, the SEC also provided general guidance in its 2008 Release on the use of company websites to assist companies in using blogs, chat rooms and interactive sites.\textsuperscript{53} Companies are increasingly using electronic sites to deliver information, including through the use of CEO blogs.\textsuperscript{54} The SEC has acknowledged “the utility these interactive website features afford companies and shareholders.”\textsuperscript{55} Specifically, the SEC has made clear that the antifraud provisions of the securities laws apply to interactive websites and that employees acting as representatives of a company cannot absolve themselves of liability by claiming to speak in their individual capacity.\textsuperscript{56} The SEC also has said that companies cannot require website visitors to waive protections afforded to them under the federal securities laws in return for admission into such websites or access to blogs.\textsuperscript{57} Blogs and interactive sites also raise concerns under Reg FD and in connection with public and private offerings. Additionally, registered investment advisers should be mindful of the antifraud rules under the Advisers Act to ensure, for example, that such websites do not constitute an impermissible advertisement such as testimonial.\textsuperscript{58} Thus, companies should be mindful to put in place internal controls to instruct employees on the proper use of such websites in connection with company activities and monitor company sponsored websites.

**Investor Tools**

The SEC has issued several electronic platforms to assist investors with understanding the markets and the federal securities laws. For example, the SEC launched Investor.gov, an investor website “devoted exclusively to investor education” in 2009 and re-launched the site in March 2011.\textsuperscript{59} The website provides information on markets, investing, and retirement.\textsuperscript{60} In 2010, the SEC created a cloud-based CRM system named Investor Response Information System (IRIS) to assist the Office of Investor Education and Advocacy (OIEA) with questions, comments, and complaints it receives.\textsuperscript{61} The SEC continues to update its website and has created Twitter sites.\textsuperscript{62}

**The FINRA Approach**

FINRA has issued a series of Regulatory Notices that provide guidance to its members on the use of social media.\textsuperscript{63} In 2009, FINRA created a Social Networking Task Force “to discuss how firms and their registered representatives could use social media for legitimate purposes in a manner that ensures investor protection.”\textsuperscript{64} In a June 2011 speech delivered to the Insured Retirement Institute: Government, Legal and Regulatory Conference, FINRA CEO Richard Ketchum highlighted social media as an ongoing challenge and noted that FINRA will issue additional guidance on social media later in 2011.\textsuperscript{65} FINRA has also posted on its website a series of Podcasts addressing FINRA rules that are impacted by social media including suitability and recordkeeping.\textsuperscript{66} FINRA will consider various social media questions such as whether electronic communications are advertisements or correspondence and whether such communications are static or interactive.\textsuperscript{67} Depending on the type of communication, supervision, pre-approval, recordkeeping and suitability rules may apply.\textsuperscript{68} Each communication issued by a member or its associates requires
close inspection regarding the applicability of FINRA rules.

Supervision

NASD Rule 3010 requires each firm to establish and maintain a system to supervise the activities of each associated person in a manner reasonably designed to achieve compliance with applicable federal securities laws and FINRA rules. In Notice 07-59 FINRA stated that electronic communications squarely fall under the FINRA supervision rules. FINRA noted that members may apply risk-based principles in determining the applicability of rules. Thus, FINRA has said that firms must have general policies and procedures prohibiting any associated person from engaging in business communications that are not subject to supervision. Members should update these policies and procedures to reflect advancements in technology. Members should also review websites prior to launch in the form the site will take at launch. FINRA has also said that only those associated persons who have received appropriate training may engage in such communications. Members must also follow-up on “red flags” that may indicate an associated person is not complying with firm policies and procedures. FINRA’s guidance clearly indicates that the use of social media is subject to all applicable FINRA rules and that members should carefully consider those rules when acting, supervising, enforcing and disciplining violations of the member firm’s policies.

Applying the FINRA rules raises interesting questions concerning the types of communications used by members. Electronic communications that are “advertisements, sales literature, or independently prepared reprints set forth in NASD Rule 2210(a) must be approved prior to use.” NASD Rule 2210 generally provides that communications with the public (for example, advertisements, sales literature, correspondence, institutional sales material, public appearances and independently prepared reprints) are subject to the principles of good faith and fair dealing. Moreover, NASD Rule 2210(b) mandates that a registered principal of a member must review and approve all advertisements, sales literature and independently prepared reprints prior to distribution. Additionally, firms should adopt policies to require the pre-approval of advertisements and sales material that have materially changed.

Whether a communication rises to the level of an advertisement, sales literature, or an independently prepared report is based on the relevant facts and circumstances. FINRA has said that websites, banner content, bulletin boards, and non-interactive content on social networking sites are all “advertisements,” which require approval by a registered principal. Emails or instant messages to a single customer or an unlimited number of existing retail customers and/or less than twenty-five retail customers (firm-wide) within a thirty-day period is “correspondence,” which does not require pre-approval by a registered principal. However, an email or instant message sent to twenty-five or more retail customers is “sales literature” which requires pre-approval. And while a password protected website is “sales literature,” real-time posts in an electronic forum (such as a social media site or chat room) constitutes a “public appearance,” which again, does not require pre-approval. Regardless, all of the communications mentioned above are still subject to member supervision.

FINRA has attempted to define static versus interactive communications. “Static” postings or communications are generally those whose content does not change for some period of time. FINRA considers a “static” posting an advertisement which requires prior approval by a registered principal. “Interactive” content, however, is not subject to pre-approval, but is still subject to supervision. Notably, the records retention rules apply to both types of communications. Social media sites can have both static and interactive elements. For example, profiles, background, or wall information on a Facebook page may be considered static, but communications via Facebook are interactive and constitute an interactive electronic forum, according to FINRA. Additionally, FINRA has said that historically blogs have contained static content posted by the blogger, but many blogs today (for example, blogs used by CEOs to communicate with the public) contain interactive content not subject to pre-approval, but
subject to supervision. The more complicated analysis involves those postings and communications that shift from interactive to static. FINRA has said that interactive content can become static, which would then trigger the pre-approval requirement under NASD Rule 2210. For example, interactive content could be copied and pasted to a static website.

**Recordkeeping**

FINRA Rule 4511 requires members to make and retain books and records in accordance with FINRA rules, the Exchange Act and applicable Exchange Act Rules such as Rules 17a-3 and 17a-4. Specifically, Exchange Act Rule 17a-4 requires members to retain originals of communications sent “relating to its business as such.” Members are required to retain these records for a period of not less than six years, the first two years in an easily accessible place. Whether a document constitutes “business as such” depends on its content, but electronic communications that do rise to the level of “business as such” must be retained. FINRA has said this analysis does not depend on the type of device used. Indeed, communications sent over an associate’s personal communications device (for example, a Blackberry or smart phone) could trigger the records retention rules. FINRA has said that a firm’s policies must include training on the proper use of such devices and the difference between a business and non-business communication. Moreover, associated persons must be instructed regarding records retention of “business as such” communications. FINRA has also said that firms may not sponsor or use sites or devices that include technology that automatically deletes communications. As noted above, the recordkeeping rules apply to both static and interactive communications. Thus, members must consider whether communications sent via social media must be retained pursuant to the recordkeeping rules.

**Suitability**

Social media use may in some situations also trigger FINRA’s suitability rules. NASD Rule 2310 generally requires that in connection with the recommendation to purchase, sell or exchange a security, a member “shall have reasonable grounds for believing that the recommendation is suitable for such customer.” The rule requires a suitability determination for every customer to whom a recommendation is made. FINRA has made it clear that recommendations made through electronic communications, including social media sites, are subject to the suitability rule.

What constitutes a recommendation, according to FINRA, depends on the facts and circumstances of the communication. For example, FINRA has determined that an email to a customer regarding a certain sector and urging the customer to purchase a security from a “buy” list constitutes a recommendation. Likewise, a website that allows customers to input certain information such as investment goals, and provides the customer with a list of specific securities that could help the customer meet its investment goals constitutes a recommendation. However, a social media site that posts research reports (which may include buy/sell recommendations), news, quotes, and charts that customers may request does not constitute a recommendation.

FINRA advises members to adopt policies and procedures reasonably designed to address suitability requirements, specifically communications recommending a specific security or product. FINRA has suggested firms prohibit all electronic communications that recommend a specific product or security. Or, alternatively, members can maintain a database of previously approved communications regarding recommendations, and only those communications may be issued.

**Third-Party Posts, Third-Party Links and Data Feeds**

Generally, FINRA does not treat posts by third-parties on a social media site established by a member firm or its personnel as the member firm’s communications subject to Rule 2210. However, posts could become attributable to the firm under the (1) entanglement theory, or the (2) adoption theory (discussed above). A member firm must ask whether it has (1) involved itself in the preparation of the content, or (2) explicitly or implicitly
endorsed or approved the content. FINRA has generally applied these theories to hyperlinks, but FINRA also applies them to third-party posts. In analyzing whether a member firm has “adopted” or is “entangled” with a third-party post, FINRA would consider the inclusion of a disclaimer from the member firm stating that the post does not reflect the views of the member firm and has not been reviewed for completeness or accuracy. Where a third-party posts a business-related communication on an associated person’s personal social media site, the person may respond provided it does not violate the firm’s policies concerning participation on a personal social media site.

Third-Party Links

FINRA permits member firms to establish links to a third-party site without assuming responsibility under NASD Rule 2210. In order to do so, FINRA’s position is that the firm must not “adopt” or become “entangled” with the content of the third-party site and the firm must know or have a reason to know that the third-party site has false or misleading information. Thus, member firms should carefully monitor for any “red flags” before linking their sponsored site to a third-party site.

Data Feeds

Data feeds are becoming commonplace in the securities industry. FINRA generally approves of the use of data feeds, but cautions that member firms must adopt policies and procedures to manage data feeds into a member firm’s website. Member firms should conduct due diligence on the data feed providers to confirm the accuracy and timeliness of the information and understand the criteria for gathering the data. Member firms should also monitor the providers for any red flags regarding inaccuracies in the information.

Personal Electronic Devices

FINRA has acknowledged the benefits of member firms’ and associated persons’ use of personal electronic devices such as Blackberries and iPhones. FINRA permits the use of PDAs for business communications, whether the device is personally owned or owned by the firm. To ensure business communications can be captured for record-keeping purposes, member firms must be able to separate business from personal communications. If the firm is able to separate communications, and it has adequate policies and procedures applicable to the use of personal electronic devices, then it does not need to monitor personal emails.

Conclusion

It would seem safe to say that the use of social media by financial services firms will continue to increase for the foreseeable future, even if all of the ways in which social media will be used cannot be foreseen. A diligent compliance function that monitors and trains employees on proper social media use should be a mandatory component of any financial firm’s compliance infrastructure.

Notes

2. Id.
8. This article does not discuss state securities laws that may apply to social media use.
9. 17 C.F.R. § 243.100(a) (2011). Reg FD applies to communications to broker-dealers and associated persons,
investment advisers, institutional investment managers, investment companies, and shareholders who may purchase or sell the securities based on the information. Id. at § 243.100(b).


13. Id. at 45,867.

14. Id. at 45,868.

15. Id. at 45,863.

16. Id. at 45,865.

17. Id.


19. 17 C.F.R. § 230.433(c).


22. Id.

23. Id.


25. Informed consent cannot be implied from investor silence. However, Example 35 the 1995 Release stated delivery of a prospectus can be inferred where an investor accesses supplemental sales literature on a website that does not require additional software or burdensome steps and the sales literature contains a hyperlink to the fund’s electronic prospectus and includes a caption referring the investor to the prospectus. 1995 Release, 60 Fed. Reg. at 53,465, ex. 35.


30. Id.


32. Id.

33. 1995 Release, 60 Fed. Reg. at 53,463-64 ex. 20 (stating “Company XYZ wants to raise $5 million by selling its common stock in a private placement pursuant to Securities Act Rule 506 of Regulation D. The Company places its offering materials on its Internet [website], which requires various information from a person attempting to access the materials to be provided to the Company prior to displaying the offering materials.”).


35. Id.


38. 17 C.F.R. § 240.14a-3(a) (2011).


42. E-Forums Release, 73 Fed. Reg. at 4451.

43. Rule 14a-17.

44. 17 C.F.R. § 240.14a-17(b) (2011).


47. Id.

48. Id. at 25,849. The SEC did not specifically discuss factors applicable to an “entanglement” theory analysis of issuer hyperlinks to third-party websites but noted that factors applicable to the “adoption” theory analysis might also be applicable to an “entanglement” theory analysis. Id. at 25,848 n.55.


50. Id. at 45,870. An issuer may also be liable for hyperlinks to third-party websites under Section 17(a) of the Securities Act when offering or selling securities. 2000 Release, 65 Fed. Reg. at 25,848 n.50.


53. See id.

54. Id. at 45,872.

55. Id. at 45,873.

57. Id.


62. Id. at 3. For example, www.twitter.com/SEC_Investor_Ed.


64. See Notice 10-06 at 2.


68. Notice 10-06 at 5.

69. FINRA Manual, NASD Rule 3010(a).

70. Notice 07-59 at 2.

71. Id. at 3.

72. Notice 10-06 at 7.


74. Notice 10-06 at 7.

75. Notice 11-39 at 5.

76. Notice 10-06 at 7.


78. FINRA Manual, NASD Rule 2210(d).

79. Id. at 2210(b).

80. Notice 11-39 at 5. For example, FINRA suggests changes made to the description of, or risks associated with, a particular product.

81. FINRA Web Guide for Registered Representatives.

82. Id.

83. Id.

84. Notice 10-06 at 2.

85. Id.

86. FINRA Web Guide for Registered Representatives.


88. Id. at 4.

89. Id.

90. Notice 10-06 at 5.

91. Id.


93. Id.


96. 17 C.F.R. § 240.17a-4(b)(4).

97. Notice 10-06 at 3.


99. Id. at 4.

100. Id.

101. Id. at 3.

102. Id. at 4.

103. FINRA Manual, NASD Rule 2310(a).

104. Notice 10-06 at 3. As is the case with the recordkeeping rule, effective July 9, 2012, NASD Rule 2310 is no longer effective, superseded by new FINRA Rule 2111. However, the FINRA Regulatory Notice describing the new rule states that FINRA Rule 2111 is generally modeled after NASD Rule 2310. See FINRA Regulatory Notice 11-02, “Know Your Customer and Suitability,” (Jan. 2011), http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p118709.pdf (“Notice 11-02”). Thus, it is probably safe to assume that FINRA
guidance provided in connection with the suitability of electronic communications under NASD Rule 2310 will more likely than not apply to FINRA Rule 2111.

105. Notice 01-23 at 2; Notice 10-06 at 3.
106. Notice 01-23 at 2; Notice 10-06 at 3. This will not change under the new suitability rule. Notice 11-02 at 2.
107. Notice 01-23 at 3.
108. Id.
109. Id.
111. Id.
112. Id.
113. Id. at 7.
114. Id.

115. Id.
116. Id. at 8.
117. Id.
119. Id. at 6.
120. Id. at 8.
121. Id. at 3.
122. Id.
123. Id.
124. Id. at 7.
125. Id.
126. Id.
127. Id.