

# The Financial Advisor's Guide to Social Media Regulations *For US, UK and Canada*



With the right preparation and attention to detail, firms should feel confident about their ability to reach out to customers through social media.

No matter how your business is structured, start with a social media usage policy. One of the critical steps to developing a sound policy is understanding the social media recordkeeping and supervision regulatory requirements.

The U.S. Securities and Exchange Commission (SEC), Financial Industry Regulatory Authority (FINRA), Financial Conduct Authority (FCA) in the UK, and Investment Industry Regulatory Organization of Canada (IIROC) recognize social media's growing role in firms' marketing and communications strategies, and provide guidance on how to extend their compliance programs to this dynamic channel. After all, it is the content of the communication, not the medium, which determines a message's status as a business record.

These regulations are evolving and can be challenging to track. In this e-book, Smarsh provides you with an overview of foundational guidance from financial services industry regulators.



# 1

## FINRA Social Media Guidance



### FINRA Regulatory Notice 10-06: Guidance on Blogs and Social Networking Web Sites

FINRA Regulatory Notice 10-06 (Jan. 2010) goes into detail on how social media communication affects recordkeeping, suitability and supervision requirements, and works to provide definition for elements unique to the medium.

The notice addresses five key guidance areas: recordkeeping responsibilities, suitability responsibilities, types of interactive electronic forums, supervision of social media sites, and third-party posts.

#### ★ Key points to know about Rule 10-06:

- ✓ **Recordkeeping Responsibilities.** Every firm that wants to use social media must first ensure that it can retain records of those communications as required by Rules 17a-3 and 17a-4 under the Securities Exchange Act of 1934 and FINRA Rule 3110. The content of the communication is determinative as to whether the communication is a business record, and thus whether firms must retain those records.
- ✓ **Suitability Responsibilities.** Communications that recommend specific investment products often present more challenges for a compliance program, and may trigger FINRA's suitability rule or other requirements under the federal securities laws (and create potential liability for the firm or its representatives). These types of communication often need to include additional disclosure to provide customers with sound information for evaluating the facts about a product.

Since social media sites often have functions that make content widely available or limit access to fewer people, broker-dealers need to determine that a recommendation is suitable for every investor that receives it. Firms need to adopt policies and procedures to address communications that recommend specific investment products.



Whether a social media communication is considered a “recommendation” depends on the facts and circumstances of the communication. Firms need to consult FINRA’s Notices to Members 01-23 (Online Suitability) for additional guidance concerning when an online or social media communication falls within the definition of a recommendation under FINRA Rule 2111 (formerly NASD Rule 2310).

- ✓ **Types of Electronic Forums.** FINRA defines the difference between social media sites and blogs that are considered “static” or “dynamic,” and therefore require different approval and supervision rules. For example, profile information on Facebook, Twitter or LinkedIn is generally static – changing infrequently – and requires pre-approval from a broker-dealer. Other static social media content must be moderated or pre-approved by a principal. On the other hand, interactive content – real-time communication – does not require mandatory pre-approval. However, firms must supervise published interactive content in a manner reasonably designed to ensure they do not violate communications rules.
- ✓ **Supervision of Social Media Sites.** FINRA says firms must adopt policies and procedures designed to ensure their representatives who use social media are appropriately supervised and trained. Firms also need to have a policy that prohibits employees from using a social media platform if it isn’t supervised by the firm. Also, since most social media sites give people several ways to communicate (status updates, messaging, etc.), firms must address each type and provide guidance about what can and can’t be communicated.



- ✓ **Third-Party Posts.** FINRA clarifies that customer or third-party content posted on a firm’s social media site is generally not considered part of a firm’s “communication with the public” under Rule 2210. However, under certain circumstances, the third-party content can become attributable to the firm, especially if the firm is involved in the preparation of the content and explicitly or implicitly endorses or approves the content. FINRA doesn’t mandate monitoring of third-party posts, but offers best practices for managing responses to third-party content.



## FINRA Regulatory Notice 11-39: Social Media, Websites and the Use of Personal Devices for Business Communications

FINRA Regulatory Notice 10-06 (Jan. 2010) goes into detail on how social media communication affects recordkeeping, suitability and supervision requirements, and works to provide definition for elements unique to the medium.

The notice addresses five key guidance areas: recordkeeping responsibilities, suitability responsibilities, types of interactive electronic forums, supervision of social media sites, and third-party posts.

### ★ Key points to know about Notice 11-39:

- ✓ **Recordkeeping.** FINRA reminds member firms that it's the content of a message that determines whether a particular communication is related to the business of the firm, and therefore should be retained. Social media communications can therefore fall under recordkeeping requirements, regardless of the type of device or technology used to transmit the communication.
- ✓ **Supervision.** FINRA clarifies that the supervision requirements for static and interactive content are different (however, recordkeeping requirements are the same). For instance, static advertising must be approved by the broker-dealer prior to posting, while interactive content does not usually need pre-approval—but both forms of communication must be supervised. It's also important to note that FINRA says interactive content may also *become* static content. For example, a comment that is taken and posted elsewhere (sourced from interactive content) can become static content, constituting it an "advertisement," which has additional regulatory ramifications.
- ✓ **Third-Party Content.** Firms must not link to any third-party social media site or website that the firm thinks might contain false or misleading information. Firms are responsible for links to third-party sites in specific situations, such as a direct link to a website; content "adoption" related to endorsements; and when a firm participates in the development of third-party content. On the other hand, firms usually aren't responsible for third-party content if the firm hasn't help create it, or doesn't know a third-party site has false or misleading information on it.
- ✓ **Personal vs. Business Use of Social Media.** Firms need to separate business and personal communications to ensure business communications are readily retrievable, and should address the retention, retrieval and supervision of these business messages via policy. Firms must also train and educate associated parties on the difference between business and non-business communications and the measures the firm takes to ensure business communications are "retained, retrievable and supervised."
- ✓ **Personal vs. Business Devices.** Firms are required to retain, retrieve and supervise business communications regardless of whether they are conducted from a work-issued device or a personal device, including smartphones and tablets.

# 2

## SEC Social Media Guidance



### Investment Adviser Use of Social Media Alert

In Jan. 2012, the SEC’s Office of Compliance Inspections and Examinations issued a National Examination Risk Alert, titled *Investment Adviser Use of Social Media*. The alert outlines factors that require consideration when a firm and its advisors use social media.

#### ★ Key points from the SEC risk alert include:

✓ **The SEC’s definition of social media:** as “an umbrella term that encompasses various activities that integrate technology, social interaction and content creation. Social media may use many technologies, including but not limited to blogs, microblogs, wikis, photos and video sharing, podcasts, social networking, and virtual worlds.”

Based on the SEC’s definition, firms may want to re-assess the activities they’ve identified as social media, because it’s easy to overlook some forms of social media such as status updates, discussion boards, direct messaging or chat rooms.

✓ **The 13 factors to be considered by advisors in their social media compliance programs:** usage guidelines, content standards, monitoring, frequency of monitoring, approval of content, firm resources, criteria for approving participation, training, certification, functionality, personal/professional sites, information security, and guidelines for official company social media accounts.

✓ **Recordkeeping responsibilities for advisors who use social media in a business capacity.** Firms must retain records of social media communications if they are used for business purposes.

In March 2014, the SEC’s Division of Investment Management then released guidance describing how investment advisors can feature public commentary about themselves on independent, third-party websites without violating the Investment Advisers Act’s testimonial prohibition.

#### KEY POINTS FROM THIS SEC GUIDANCE INCLUDE:

✓ **When comments about an advisor’s firm appear on independent, third-party social media sites, the firm may promote those comments under specific circumstances.** In some scenarios, SEC-registered advisors can even steer prospects to comments and testimonials—provided the advisor:

- Doesn’t encourage clients to post social media or web comments.
- Doesn’t write the comments under an alias to hide the reviewer’s true identity.
- Publishes the entire body of comments—without filtering negative comments.

Also, if you choose to include a link or content from a third-party, independent site on your social media pages, consider archiving the third-party sites. This isn’t mandated by the SEC, but it may help your firm substantiate the validity of linking to this type of content.

# 3

## United Kingdom: FCA Social Media Guidance



### GC14/6 Social media and customer communications

In the UK, the Financial Conduct Authority (FCA) released a guidance consultation paper (Aug. 2014) outlining its supervisory approach to financial promotions in social media.

The paper is intended to help firms understand how they can use social media and meet the FCA's financial promotion and recordkeeping rules.

The guidance applies to a wide range of content types, because the FCA defines social media as websites and applications that allow users to create and share content or participate in social networking. Blogs, microblogs (Twitter), social networks (Facebook, LinkedIn), forums, and image and video-sharing platforms including YouTube, Instagram and Pinterest all fall into this category.

#### ★ Key points to know about the FCA social media guidance:

- ✔ **Follow the basic rule: Be fair, clear and not misleading.** To ensure consumers are given the basic level of fair and balanced information at their first interaction with a firm, the FCA reminds its members that certain industry sectors have specific communications requirements. However, there is an over-arching principle that any communication (including social media) should be fair, clear, and not misleading, under the Principles for Business in the UK.
- ✔ **The definition of a “financial promotion” is broad.** Under the FCA definition, any form of communication, including social media, has the potential to be considered a financial promotion—if it includes an invitation or incentive to engage in financial activity. The FCA provides visual examples in the consultation document, showing what does and doesn't qualify as a financial promotion. Also, firms promoting investment products on social media must make it clear when a communication is a promotion. One generally accepted way to do this is to use #ad when posting to character-limited media, including Twitter.



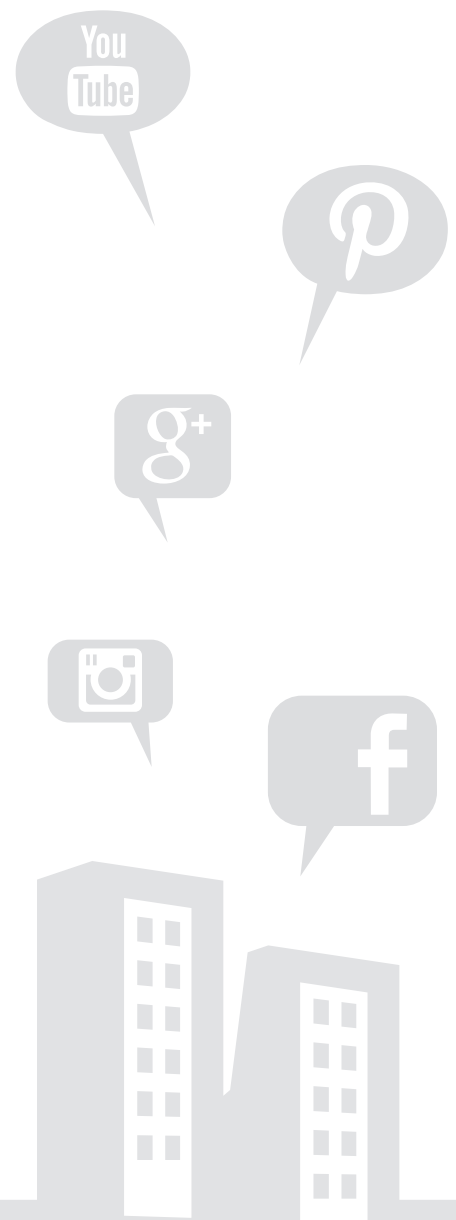
✔ **Be thoughtful when talking about complex financial product or service features on social media.** Firms should make consumers aware of the potential benefits and risks of a financial product. As a possible solution for dealing with the character limits on social media, it may be possible for firms with complex products to “signpost a product or service with a link to more comprehensive information, provided that the promotion remains compliant in itself.” Or, the firm may prefer to use “image advertising” (similar to brand advertising) where the ad only consists of the name of the firm, a logo or other image associated with the firm, a contact point, and a reference to the regulated activities provided by the firm or to its fees and commissions.

For promotion of some products or services, firms must also include risk warnings or other statements in social media posts to meet compliance requirements. The FCA provides examples of potential ways to do this, even with character limitations, such as inserting images or infographics into tweets to display the required information.

✔ **Consider each communication individually.** Each tweet, Facebook post, web page or other social communication needs to be considered individually, and must comply with the relevant rules. For instance, during a campaign, each individual communication must include clear and visible relevant risk warnings, i.e. “The value of your investment can go up or down so you may get back less than your initial investment.”

✔ **Firms are responsible for their own communication, but not for messages included in a social media share or forward of their communication.** If a consumer re-tweets a firm’s tweet, responsibility lies with the communicator, not the firm. However, any violations of rules in the firm’s original communication are still the responsibility of the firm. Also, if a firm re-tweets a customer’s tweet, the firm becomes responsible as the communicator, even though it didn’t generate the original content.

Firms are obligated to have a system in place to keep adequate records of significant digital communications. The records help protect consumers, and allows firms to deal more effectively with any subsequent claims or complaints. Firms’ should not rely on the social media channels themselves to archive communications.



# 4

## Canada: IIROC Social Media Guidance and Rules



### IIROC Regulatory Notice 11-0349 and IIROC Rule 29.7

IIROC Regulatory Notice 11-0349 (Dec. 2011) from the Investment Industry Regulatory Organization of Canada (IIROC) addresses recordkeeping and supervision requirements of communication on social media websites. In addition, all methods used to communicate, including social media, blogs and chat rooms, are subject to IIROC Dealer Member Rules.

IIROC Rule 29.7 is the recordkeeping requirement, which requires firms to archive, monitor, and review electronic advertisements, sales literature and correspondence for clients, including communication on social media sites such as Facebook and Twitter.

IIROC 29.7 and Regulatory Notice 11-0349 require that firms establish written supervisory procedures, and training and monitoring systems for social media communications.

### ★ Key points to know about IIROC social media guidance:

- ✔ **Recordkeeping Responsibilities.** Firms have to keep records (archive) of their business social media activities. IIROC says the device used doesn't matter; it's the communication that matters and is subject to regulatory rules. The content posted on social media sites including Facebook, Twitter and LinkedIn, plus blogs and chat rooms, is subject to applicable legislative and regulatory requirements.
- ✔ **Suitability and Recommendations Requirements.** Dealer Members have to be mindful about their regulatory obligations that may be triggered by social media communications. Content must take the suitability requirements into account, which are stipulated in IIROC Dealer Member Rule 1300.  
  
At the most basic level, Dealer Members must implement procedures to monitor or prohibit electronic communications that must follow and comply with IIROC's suitability rules.
- ✔ **Supervisory Responsibilities.** Dealer Members must establish policies and procedures that allow them to comply with their supervisory obligations, and protect clients from misleading or false statements on social media.  
  
Static social media content, including a profile, background or wall information on Facebook, LinkedIn and Twitter often must be pre-approved by the Dealer Member. Interactive content includes real-time discussion, and must be supervised to ensure compliance, even though this type of content doesn't require pre-approval.
- ✔ **Third-Party Communications and Research Procedures.** IIROC states third-party posts may be attributed to or considered an endorsement by the Dealer Member (firm), and trigger regulatory or legislative requirements, depending on the circumstances. As a result, many firms prohibit their representatives from "liking", sharing or re-tweeting a third-party post.



## ★ Putting it All Together

Once you become familiar with your regulatory recordkeeping and supervision obligations and know what you can share, social media is an incredibly effective way to engage with your customers and thousands of other prospects online. Knowing the social media compliance “ropes” also allows you to concentrate on developing your own unique content and style that focuses on your target demographic, so you can reach your business goals faster.

By using social media and following the compliance rules, you’ll not only set your firm apart from your competitors—you’ll be more successful in attracting the clients, employees and referrals.

### Smash recommends the following best practices when adopting and governing social media:

**1** Implement the most up-to-date regulatory guidance into your firm’s social media policies and practices. Have a detailed, reasonable social media policy in place, and review all applicable guidance notices to ensure your firm’s policy reflects them. Your policy is an active document, signed by your firm’s representatives, that outlines:

- Exactly how (and why) your representatives may use social media.
- Which social media platforms and accounts can be used for business purposes.
- Who is authorized to use your firm’s social media account(s).
- How social media activities are monitored.
- How your social media policy is enforced.

**2** Train employees on social media policies. Your advisors need to know your firm’s official social media policy, and receive training on how to use social media in accordance with your rules. Ongoing employee training is a must, since social media platforms and practices change rapidly and regulatory guidelines evolve quickly. Key training topics include:

- Personal vs. business social media
- Which social media messages need to be approved before posting
- Which messages need to be reviewed after posting
- How to manage third-party social media content

**3** Supervise and archive your firm’s social media activities. An archiving solution will allow your firm to capture official records of posts, and search, supervise, and produce those records in their original format for production when necessary, such as during an audit, examination or e-discovery event. You’ll want to archive and monitor content from your firm’s approved accounts on all of your different social media platforms, and accommodate new platforms as needed.

Your compliance team also needs to demonstrate they’ve reviewed your firm’s social media posts, documenting who has evaluated and approved each post. Make sure you can track the lifecycle of each social media message, including the exact date and time it was created (or deleted), and the precise actions taken by the firm if a message is escalated during review. An automated audit trail can help substantiate and document your social media review actions taken, and provide read-only-format evidence that supervisors enforce policies.

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