

FINRA's Social Media Influencer Guidance: A Conversation Between Sander Ressler and Tom Selman

By Sandler Ressler and Tom Selman



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On February 28, 2023, the Financial Industry Regulatory Authority, Inc. (FINRA) provided a notice relating to social media influencers, customer acquisition and related information protection. The notice focused on social media influencers and referral programs as well as firms' privacy obligations and summarized some guidance and possible best practices. Within the notice, FINRA discussed the need to maintain records of social media influencer and referral program communications consistent with SEC and FINRA recordkeeping obligations. While FINRA did not identify the scope of these obligations, it emphasized the need to maintain copies of any social media communications posted by the influencer as well as communications by the firm on an influencer's social media accounts.

The use of social media has exploded in recent years and firms are rightly exploring its marketing potential. In this article, Sander Ressler, Managing Partner of Essential Edge, a compliance outsourcing firm, and Tom Selman, Founder of Scopus Financial Group and a former FINRA executive, discuss the challenges of marketing using social media and the expectations of regulators as discussed in the Notice.

Sander: In February, FINRA issued an update to its sweep on "social media influencers." To me, the use of spokespersons is covered already under their advertising rule, but the update suggests there is a lot more to be done by broker-dealers if they engage a social media influencer. Tom, could you give me your perspective on what FINRA is trying to accomplish with this update?

Tom: According to the guidance, "social media influencers" are third parties with whom a broker-dealer contracts to provide communications with the public through social media. The guidance follows FINRA's sweep of broker-dealers' use of social media influencers, announced by FINRA in September 2021. The guidance suggests practices that firms should consider in supervising social media influencers.

Sander: Understood. I found the guidance to be a bit opaque and difficult to translate into a definable and realistic written business practice or procedure. Do you agree?

Tom: I can't disagree. Unfortunately, the guidance does not precisely define "social media influencer," explain the unique risks that they pose, state any FINRA or SEC rules at issue, or compare the guidance to existing rules and regulations.

Sander: What are FINRA's concerns?

Tom: The guidance is not clear. Here are three concerns that I might have if I were still at FINRA:

First, a broker-dealer could contract with a social media influencer to communicate on its behalf and the communications might be misleading.

Second, a broker-dealer might compensate an influencer for customer referrals without disclosing any compensation it paid for those referrals.

Third, the broker-dealer could structure this referral program in a way that violates the broker-dealer registration requirements under the Securities Exchange Act.

Sander: Even with these concerns in mind, isn't the use of third-party spokesmen common in the industry?

Tom: For decades, broker-dealers have hired third-party spokesmen, like sports celebrities or actors. It is also not unusual for broker-dealers to establish customer referral programs.

FINRA does not explain why a social media influencer presents a different problem than these commonly used programs.

It seems to me that FINRA could have simply reminded firms that if they hire a spokesperson to communicate on behalf of the firm, those communications will be considered to be the firm's communications – or at a minimum the firm has adopted or become “entangled” with those communications – and Rule 2210 (FINRA's advertising rule) would apply. If the influencer is a customer of the broker-dealer then Rule 2210(d)(6) concerning testimonials would apply.

FINRA also could have reminded firms that, with respect to any referral program, the broker-dealer must comply with Rule 2040 and the SEC's broker-dealer registration requirements.

Sander, let me ask you: Why do you think FINRA issued guidance on social media influencers?

Sander: The guidance suggests, without clarification, that a social media influencer is unique or different than a spokesperson in some way. By issuing this guidance, FINRA implies that a skateboarder, chef, Tiktok'er or other social media influencer presents a unique compliance or reputational risk for the broker-dealer and perhaps additional risk for its customers. Not to be repetitive, but the guidance fails to define or even discuss any potential harm to a firm or its customers that could be incurred by contracting with a social media influencer as opposed to anyone else already covered by their rules.

Tom: Sander, what should compliance professionals do with this guidance?

Sander: As a former Chief Compliance Officer, I know that the “devil is in the details”. For example: FINRA recommends “additional controls” for social media influencers with a relatively large social media presence but fails to define what “large” means. FINRA also suggests that firms evaluate an influencer's background for reputational risks without any further guidance on what reputational risk means and what should be included in a background check. To the best of my knowledge, none of these “controls” have ever been applied to spokespersons.

Tom: The guidance also suggests that a broker-dealer provide training and define permitted and prohibited conduct by a social media influencer. What is FINRA getting at?

Sander: I do not understand this suggestion. If a broker-dealer hires a social media influencer to communicate on behalf of the broker-dealer, aren't those communications of the broker-dealer? Is FINRA suggesting they have the authority to regulate a non-registered third-party social media influencer?

Tom: The broker-dealer needs to approve all advertising materials regardless of the method of delivery to the public. I am not sure what additional benefit “training” of a non-registered influencer would provide. If a broker-dealer enters into a referral program with a social media influencer, then the terms of the program and the broker-dealer's implementation would determine whether the broker-dealer has complied with FINRA Rule 2040 and other requirements.

Sander: By its own terms, the guidance doesn't create new legal or regulatory requirements. Although we both find the guidance to be unclear, I think we can agree that until FINRA clarifies it, a broker-dealer only should enter into an arrangement with a social media influencer if the firm is confident that it will be able to comply with advertising rules and with the broker-dealer registration requirements.

Tom: Agreed!

Sander: Tom, it has been a long-held practice that regulators tend to communicate their expectation through regulatory actions against firms. When faced with similar situations in the past, I always favored my firm to keep detailed written documentation of our marketing and compliance efforts rather than waiting for more specificity from the regulators. In your opinion, do you agree with my past approach and what specifically can a firm do today to hopefully avoid any regulatory action pertaining to a firm's use of social media and influencers?

Tom: Sander, I agree with your past approach. FINRA has issued excellent guidance concerning the use of social media. For example, Regulatory Notice 17-18 covers recordkeeping, third-party posts, and hyperlinks to third-party sites. It provides guidance in a question-and-answer format.

Anyone engaged in social media practices should review these notices, apply the guidance to their own practices, and incorporate it into their written supervisory procedures. Social media changes frequently and firms need to update their WSPs to reflect the latest uses of social media, and the potential pitfalls. As always, proper training of personnel, perhaps in the Firm Element, is essential to a sound compliance program. ■