

# Public Investors Arbitration Bar Association

## 2014 Officers

**Jason Doss**  
*President*

**Joseph C. Peiffer**  
*Executive Vice-President/  
President-Elect*

**Jeffrey R. Sonn**  
*Secretary*

**William A. Jacobson**  
*Treasurer*

## 2014 Directors

**Hugh D. Berkson**  
*Ohio*

**Lisa A. Catalano**  
*New York*

**Jason Doss**  
*Georgia*

**Samuel B. Edwards**  
*Texas*

**Richard S. Frankowski**  
*Alabama*

**Glenn S. Gitomer**  
*Pennsylvania*

**Scott C. Ilgenfritz**  
*Florida*

**William A. Jacobson**  
*New York*

**Marnie C. Lambert**  
*Ohio*

**Richard A. Lewins**  
*Texas*

**Angela H. Magary**  
*Massachusetts*

**Peter J. Mougey**  
*Florida*

**Joseph C. Peiffer**  
*Louisiana*

**Jeffrey R. Sonn**  
*Florida*

**Andrew J. Stoltmann**  
*Illinois*

**Robin S. Ringo**  
*Executive Director*

VIA EMAIL TO [pubcom@finra.org](mailto:pubcom@finra.org)

May 23, 2014

Marcia E. Asquith  
Office of the Corporate Secretary  
FINRA  
1735 K Street, NW  
Washington, DC 20006-1506

**Re: Regulatory Notice 14-14; Comment on the Effectiveness and Efficiency of its Communications With the Public Rules**

Dear Ms. Asquith:

The Public Investors Arbitration Bar Association ("PIABA") appreciates the opportunity to provide FINRA with comments on the effectiveness and efficiency of its communications with the public rules pursuant to Regulatory Notice 14-14.

PIABA is an international bar association comprised of attorneys who represent investors in securities arbitrations. Since its formation in 1990, PIABA has promoted the interests of the public investor in all securities and commodities arbitration forums, while also advocating for public education regarding investment fraud and industry misconduct. Our members and their clients have a strong interest in FINRA rules relating to both investor protection and disclosure.

In Regulatory Notice 14-14, FINRA requests comment on the effectiveness and efficiency of its public communications rules, FINRA Rules 2210-2216, to support a retrospective review of those rules. The purpose of the retrospective rule to determine whether Rules 2210-2216 are meeting their investor-protection objectives by reasonably efficient means, taking into account the rules' substance and process. PIABA supports FINRA's retrospective review of the public communications rules and welcomes FINRA's efforts to calibrate its rules from time to time to further investor protection.

PIABA believes that FINRA should "do no harm" to Rules 2210-2216 by relaxing any requirement under those rules. When Rules 2210-2216 were adopted, they greatly simplified NASD Rule 2210 by reducing and consolidating the categories of public communications from six to three. This change improved predictability and accountability under the Rules. *See In the Matter of Application of William J. Murphy and Carl. M. Birkelbach*, SEC Release 34-69923, at 23 (July 2, 2013) (rejecting argument that earlier NASD Rule 2210 did not apply to misleading and false communications detailing options trading returns and strategies because they were not "sales literature").

Moreover, intervening regulatory developments suggest that greater scrutiny of FINRA members' and associated persons' public communications will be necessary in the near future. Rules 2210-2216 were adopted in February 2013, a little more than a year ago. On July 13, 2013, the Securities and Exchange Commission ("SEC") promulgated rules to implement the Jumpstart Our Business Startups Act ("JOBS Act"), which eliminates the restriction on general solicitation and advertising in conjunction with private placements under SEC Rule 506. FINRA should not relax Rules 2210-2216 until stakeholders have had significant time to assess the JOBS Act's impact on the public communications rules.

In addition, PIABA notes that FINRA and the International Organization of Securities Commissions (IOSCO) have made the examination of social media a regulatory priority. Given their instantaneity, social media communications are not generally subject to pre-approval, but are subject to supervision and recordkeeping requirements. FINRA Rule 2210(b)(1)(D)(ii), (2). Absent proper supervision by FINRA members, associated persons' social media communications may easily violate Rules 2210-2216. *See FINRA, Letter of Acceptance, Waiver and Consent*, No. 2010021538701, at 3-4 (Nov. 23, 2010) (associated person fined and suspended for misleading communications on website and twitter.com account and failing to disclose activities to member firm); *FINRA, Letter of Acceptance, Waiver and Consent*, No. 2010023789701, at 2 (Mar. 12, 2013) (associated person fined and suspended for misleading youtube.com videos promoting equity-indexed annuities using and failing to disclose activities to member firm); *FINRA, Letter of Acceptance, Waiver and Consent*, No. 2010023789701, at 2 (Mar. 12, 2013) (associated person fined and suspended for misleading comments on interactive, online bulletin board and facebook.com profile promoting pharmaceutical company stock).

To date, there are no recorded enforcement actions taken against member firms failing to comply with their Rule 2210-2216 recordkeeping requirements as to social media. PIABA continues to be concerned, however, that member firms' recordkeeping procedures for social media are not adequate. *See, e.g., FINRA, Letter of Acceptance, Waiver and Consent*, No. 2012031270301, at 3-7 (Jan. 28, 2013) (fining and censuring ING Groep N.V subsidiaries \$1.2 million for failing to retain or review millions of e-mails over a six-year period); *FINRA, Letter of Acceptance, Waiver and Consent*, No. 2010032218001, at 3-7 (May 21, 2013) (fining and censuring LPL Financial LLC \$7.5 million for significant e-mail system failures and failing to supervise its representatives); *Dept. of Enforcement v. Hedge Fund Capital Partners*, No. 2006004122402, at 17-18 (NAC; May 1, 2012) (despite written procedures, member firm failed to keep copies of associated persons' emails and instant messages from May 2005 to September 2006; associated persons used non-firm email and instant message systems and member firm did not keep an archive server of firm emails).

In addition, PIABA believes that FINRA should consolidate all of its public communications rules and guidance into a single resource. Guidance on public communications may be found in Regulatory Notice 07-59, 10-06, 11-39, and 13-03, and on FINRA's website at <http://www.finra.org/Industry/Issues/Advertising/P197604> (questions and answers); <https://www.finra.org/Industry/Education/OnlineLearning/Podcasts/Communications/>

Marcia E. Asquith  
May 23, 2014  
Page 3

(podcasts). Consolidation of such guidance will provide stakeholders with an easy reference point, which, in turn, should lower compliance costs and enhance FINRA's administration of Rules 2210-2216.

In sum, PIABA supports FINRA efforts to periodically revisit and recalibrate its significant rulemaking. However, PIABA urges FINRA not to relax the existing rules until stakeholders have more time to assess the impact the JOBS Act and social media on public communications by FINRA members and associated persons. Given the recent, record-breaking fines imposed on member firms for recordkeeping failures, FINRA may wish to consider endorsing a set of best practices for public communications and recordkeeping and auditing member firms' compliance through additional "targeted sweeps."

Thank you once again for the opportunity to comment on this matter.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Jason Doss", with a long horizontal flourish extending to the right.

Jason Doss  
PIABA, President