

Client Alert

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UK's Financial Services Regulator Issues Draft Guidance on Social Media – should we Favourite* or #Fail?

By Susan McLean

On 6 August 2014, the UK's financial services regulator, the Financial Conduct Authority (FCA), issued long-awaited draft guidance on the use of social media in financial promotions by regulated financial institutions.

But if financial services firms operating in the UK were hoping that this guidance would provide them with a clear framework to help jump-start their social media strategies, they will be disappointed. For one thing, the guidance is focused on financial promotions, so firms will need to continue to evaluate all of their social media activities carefully against existing FCA rules.

The proposed guidance – “GC14/6 Social media and customer communications: The FCA's supervisory approach to financial promotions in social media” (“Guidance”) – is open for consultation until 6 November 2014. The FCA intends to continue discussions with the financial services sector during the consultation period. It has also set up the hashtag #smfca for those wishing to discuss the Guidance on Twitter.

GUIDANCE

As outlined in our previous alert [“Behind the Curve – Are Legal & Regulatory Concerns Preventing UK Financial Services Companies From Fully Harnessing Social Media”](#), until now the UK financial services regulator has offered very limited guidance on the use of social media. The FSA (the FCA's predecessor) issued a two-page high-level guidance paper on financial promotions using new media back in June 2010. Compare this with the U.S. where various items of regulatory guidance (see our previous [Guide to Social Media and the Securities Laws](#)) on the use of social media, including from FINRA, FFIEC, and SEC, have been published.

This lack of regulatory clarity in the UK has been seen by some UK-based financial institutions as a deterrent from fully harnessing the benefits of social media, as highlighted at a [recent Social Media Leadership Forum event](#).

In the new draft Guidance, the FCA acknowledges that social media can be a particularly powerful channel of communication, and is increasingly becoming the preferred media for customer communications and financial promotions. The FCA states that it does not want to prevent social media use. However, the FCA acknowledges that forms of digital media often have character, space, and/or time limitations, which can constrain their use. It appreciates that, in some circumstances, firms may perceive difficulties in complying with the FCA's rules when using digital media. Accordingly, the Guidance is intended to clarify and confirm the FCA's approach to the supervision of financial promotions in social media.

The FCA's objectives include promoting effective competition in the interests of consumers, as well as consumer protection. The FCA accepts that digital media can allow new and smaller firms to have a presence in the marketplace, and may also allow firms to reach a wider audience. In principle, this can make it easier for

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consumers to switch providers and enhance competition. The FCA therefore sees significant potential benefits from the use of digital media by firms, as long as this is responsible and customer-focused.

The FCA repeats the position that it took in previous guidance and in all public statements made previously on the topic of social media (*i.e.*, that its rules are intended to be media-neutral). The overarching principle for all communications with consumers is that they must be “fair, clear and not misleading”.

The key recommendations included in the Guidance are as follows:

- Any form of communication made by a firm is capable of being a financial promotion – the key is whether it includes an invitation to engage in financial activity.
- Each communication must be considered individually and comply with the relevant rules.
- Some communications, including advertisements, will not include an invitation to engage in financial activity – for example, communications solely relating to the firm’s community work, etc.
- Only financial promotions made in the course of business will be caught by the FCA rules. The definition laid down in the rules effectively requires a commercial interest on the part of the firm. The FCA provides a couple of examples to illustrate the issue:
 - if a company is already operating, it will be acting “in the course of business” when seeking to generate additional capital. However, if the company has not yet been formed, and the proposed founders approach friends and family to obtain start-up capital, they will not generally be acting “in the course of business”; and
 - where a personal social media account is used by someone associated with a business, say the CEO, that business and individual should take care to distinguish clearly personal communications from those that are, or are likely to be understood to be, made in the course of that business.
- All financial promotions made via digital media must be clearly identified as such. If using Twitter, the FCA suggests including #ad in the tweet.
- Firms must identify risks, as well as benefits, and comply with applicable past performance rules.
- Risk warnings must be suitably prominent. If a risk warning is set out in too small a font size and/or lost in surrounding text, the promotion will not be compliant. Of course, social media often poses particular challenges because of space or character limitations. The FCA has suggested that one solution is to insert images (such as infographics into tweets) – as long as the image itself is compliant.
- The FCA acknowledges that the functionality which allows a Twitter image to be permanently visible may be switched off so that the image appears simply as a link. Accordingly, any risk warning or other information required by the rules cannot appear solely in the image.
- It may be possible to signpost a product or service with a link to more comprehensive information, provided that the signpost remains compliant in itself.

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- Firms may be able to advertise through image advertising, which is less likely to cause compliance issues. An image advertisement (*i.e.*, an advert that only includes the name of the firm, a logo or other image associated with the firm, contact point, and a reference to types of regulated activities provided by the firm or its fees or commissions) may be exempt from financial promotion rules, but will still need to be fair, clear, and not misleading.
- All communications must be fair, clear, and not misleading, even if the communication ends up in front of a non-intended recipient (*e.g.*, due to a re-tweet, etc.). One way of managing this risk is to use software that enables advertisers to target particular groups very precisely.
- Where a recipient shares or forwards (*e.g.*, re-tweets) a firm's communication, responsibility for that communication lies with the communicator so the firm would not be responsible (although the original communication would obviously still need to be compliant). However, if a firm re-tweets a customer's tweet (*e.g.*, one praising its customer service), the firm would be responsible even if the firm did not create the tweet.
- For the purpose of FCA rules, a tweet is not a real-time communication because it creates a record, is directed at multiple recipients, and doesn't require immediate response.
- Being a follower of a regulated firm on Twitter or having "liked" its Facebook page does not constitute an "existing client relationship" or "express request" for a communication under applicable rules. Issuing a financial promotion to such an individual would therefore be considered unsolicited.
- Firms need to put in place adequate systems for signing off digital media communications. Sign-off should be by a person of appropriate competence and seniority within the organisation. The FCA doesn't address how this is achieved when social media activities themselves are outsourced.

OTHER ISSUES

The draft Guidance focuses on financial promotions, but firms are likely to have to consider other regulatory issues in the context of a social media strategy. For example, in terms of complaints-handling, it may be challenging for firms to identify when complaints are being made via social media and whether their complaints-handling procedures capture such complaints. In addition, if a firm outsources any critical activities as part of its social media strategy, it will need to take account of applicable outsourcing rules and guidance.

There is also a whole host of general legal issues arising from the use of social media that firms will need to consider, *e.g.*: in terms of:

- market abuse rules;
- employees' and agents' use of social media – both external platforms and internal communication/collaboration platforms;
- use of social media in recruitment;
- data privacy and security;
- crisis management and damage to reputation;

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- protection and infringement of intellectual property rights;
- general advertising and marketing rules (e.g., the CAP Code);
- consumer protection/unfair terms and trading rules;
- user generated/third party content; and
- insurance.

These issues are not covered in the draft Guidance.

CONCLUSION

The Guidance does not introduce any major surprises. The FCA had warned that the Guidance was not going to be prescriptive, and it isn't. By and large, it follows very closely existing guidance relating to financial promotions, and includes some pretty clear-cut examples of compliant and non-compliant communications.

In order to give firms further clarity in respect of their social media compliance, there are certain areas where the FCA could consider widening the scope of its Guidance improvements. For example:

- the Guidance appears to envisage a traditional form of promotion (albeit via digital media) which involves a firm simply publishing advertisements. Of course, social media is about more than one-way communication. Genuine interactive engagement is what consumers are looking for and is the key to the most successful social media strategy. Accordingly, it would be helpful for the FCA to include a few more nuanced scenarios in its Guidance, such as where a firm's employee has a dialogue with a customer or potential customer via social media;
- as firms are increasingly using social media for customer services and complaints, it would be helpful to provide some illustrations of compliance in this area; and
- the FCA has communications with consumers very much in mind, but we know that firms in the Business-to-Business sector are increasingly using social media in their business. Accordingly, it would be helpful for the FCA to consider including some B2B-specific scenarios in the final Guidance;

So, overall, the draft Guidance is not a #fail, and is a step in the right direction, but #smfca is unlikely to be trending any time soon.

In the meantime, firms may just have to take a deep breath and take the plunge. After all, social media is just another way of communicating with customers – so firms need to exercise the same common sense, judgment, and risk-balancing that they use with other types of media. As social media is increasingly the way that consumers want to communicate, staying out of the game is no longer an option.

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