

March 25, 2015

Introduction

The FCA published its [Finalised Guidance \(FG15/4\)](#) on *Social media and customer communications: The FCA's supervisory approach to financial promotions in social media* on 13 March 2015 (**Finalised Guidance**). The Finalised Guidance seeks to clarify the FCA's approach to financial promotions in social media following the publication of the FCA's Guidance Consultation document on *Social media and customer communications* in August 2014 (**Draft Guidance**) and the three month consultation process on the proposed guidance that ensued (**Consultation Process**).

This client alert summarises the FCA's approach to financial promotions in social media, whilst noting key differences between the Finalised Guidance and the Draft Guidance.

What is a financial promotion?

The FCA notes that one of the issues facing firms is the uncertainty over what constitutes a financial promotion in social media. In answering this question, the FCA reminds firms of the financial promotions restriction:

*"a person ('A') must not, in the course of business, communicate an invitation or inducement to engage in investment activity"*¹

To be a financial promotion, the communication must therefore (1) be promotional; (2) focus on a regulated activity; and (3) pass the *"in the course of business test"*, which *"requires a commercial interest on the part of the communicator."* Thus individuals seeking to raise capital for a company that is already operating would pass the *"in the course of business test"* but individuals approaching friends and family for capital at the pre-formation stage of a company would not.

The FCA's Feedback Statement on the Consultation Process indicates that further explanation was requested by participants regarding the difference between personal and business related posts on the social media accounts of firms' employees. The key factor here is whether the employee can be said to be acting in the course of business, which will depend on whether the object of the communication is to obtain business for their employer. The FCA warns that care should be taken to clearly differentiate such business communications from genuine non-business communications.

In its Draft Guidance, the FCA highlighted the specific requirement that financial promotions are clearly identifiable as such, and suggested the use of #ad as a means of achieving this on character-limited social media. The FCA has deleted this suggestion from its Finalised Guidance, explaining that a *"significant aspect of the hashtag functionality is that, when clicked on, the consumer will be led to a separate page where all the communications that have used this hashtag will be displayed... There is potential for consumer confusion here as the majority of the information will be irrelevant...we also believe that the hashtag functionality is inappropriate for the inclusion of risk warnings or statement of jurisdiction ...the warning or information would be ultimately diminished by the running together of words...and by the link to another page with largely irrelevant material..."*

Fair, clear and not misleading

In both the Draft and Finalised Guidance, the FCA reminds firms that communications must be *"fair, clear and not misleading"*.² Firms are also required to *"ensure that their original communication would remain fair, clear and not misleading even if it ends up in front of a non-intended recipient (through others re-tweeting on Twitter or sharing on Facebook)"*. However, see below section on "forwarding or sharing communications" for a contradiction in the FCA's approach to responsibility for retweeted or shared communications.

Firms must also ensure that consumers are made aware of both the relevant risks as well as the potential benefits of a financial product. In doing so, firms should consider character limitations that apply to certain social media that would limit the firm's ability to market complex features of a financial product in a fair and balanced way. The FCA suggests that firms could instead *"signpost a product or service with a link to more comprehensive information, provided that the promotion remains compliant in itself"* or *"use 'image advertising' to promote a firm more generally"*

The FCA reminds firms of its expectations on prominence and directs firms to its September 2011 [Prominence Guidance](#), as well as its sector-specific rules³ on prominence. In assessing compliance with rules on prominence, the FCA *"looks at prominence in the context of the promotion as a whole"* and *"considers the target audience, nature of the product or business and the likely information needs of the average recipient."*

Other regulations and risk warnings

Firms are reminded that the FCA's *"rules are intended to be media-neutral"* and requirements to include risk warnings and other statements for certain products and services apply equally to social media communications. The key issue firms face in including such statements is character limitations that apply on certain social media.

The FCA suggests the insertion of compliant images into communications such as tweets as a possible solution to the problem. However, as the FCA notes, *"the functionality that allows a Twitter image to be permanently visible, may be switched off so that the image appears simply as a link. Therefore, where the financial promotion triggers a risk warning or other information required by our rules, this cannot appear solely in the image."* The FCA explains in its Feedback Statement that in such situations both the invitation/inducement and the risk warning/balancing statement need to be provided within the inserted image and that the main message should only include signposting language that doesn't amount to a financial promotion.

The FCA also suggests that firms could tweet a link to a website with a financial promotion and include some signposting language that encourages users to open the link, but reminds firms that *"the signpost must be standalone compliant"*.

Standalone compliance

The FCA's position on standalone compliance is that communications will be considered individually in assessing compliance. A number of participants of the Consultation Process suggested that tweets and posts should be viewed as the start of the customer journey and that standalone compliance should be assessed on the combination of the tweet or post and the website to which it links. This 'click-through approach' suggests that the initial tweet or post only needs to meet the fair, clear and not misleading test, and that any further requirements triggered by the content of the post, can be met on the website to which it links. This would present a neat solution to the issue of character limitations.

The FCA's view, as expressed in its Feedback Statement, is that *"a tweet and a website will be separate financial promotions, as defined in the Financial Services and Markets Act 2000 (s.21). On that basis, each must comply with any specific requirements in our rules, as well as being fair, clear and not misleading."* So for example, where the consumer credit and mortgages European Directives require the inclusion of representative examples in adverts, *"the whole of the representative example must be included"*

in a single financial promotion". The FCA again suggests the insertion of images into tweets and posts as a solution to the character limitations challenges that firms face.

In its Feedback Statement, the FCA accepted criticism it received from participants of the Consultation Process that its use of a banner to demonstrate standalone compliance in the Draft Guidance was incorrect: first, because banner promotions are *"not strictly social media"* and second, because *"the inclusion of the risk warning in the final frame of the banner meant that the example was actually non-compliant"*. This example has consequently been removed from the Finalised Guidance.

Image advertising

The FCA suggests image advertising⁴ as another potential solution to the issue of character limitations where firms are looking to advertise their presence in the market. Image advertising, as defined in the FCA Handbook, is communications that include only one or more of the following: *"(a) name of the firm; (b) a logo or other image associated with the firm; (c) a contact point; and (d) a reference to the types of regulated activities provided by the firm, or to its fees or commissions"*.

Firms are reminded that the rules on image advertising will vary from one sector to another.

Sharing or forwarding communications

In the both the Draft and Finalised Guidance, the FCA regards shared (or forwarded or retweeted) communications by a recipient as the responsibility of the recipient rather than the original communicator, but reminds firms that responsibility for any non-compliance in the original communication remains with the original communicator rather than the sharer.

In response to queries raised by participants of the Consultation Process, the FCA goes a step further in its Feedback Statement and the Finalised Guidance in considering what happens if the breach is caused by the sharing. The FCA considers that:

- when a consumer shares a communication, s/he is not acting in the course of business so the communication would not be subject to the financial promotion rules; but
- where a firm forwards a communication, the firm is acting in the course of business, so the communication will be subject to the financial promotion rules if the content of the communication is promotional and focuses on a regulated activity.

Real time and unsolicited financial promotions

Firms are reminded that specific legal requirements apply to unsolicited promotions (marketing) and that the distinction between real and non-real time communications determines the rules that are engaged⁵. The FCA clarifies that although digital social media financial promotions are real-time in the ordinary sense of the word, they do not necessarily meet the definition of a real time communication under article 7 of the Financial Promotions Order. So, for example, a tweet is considered to be non-real time because it creates a record of the communication, is directed at multiple recipients and does not require an immediate response.

Approval and record-keeping

The FCA's general position is that firms should have systems in place to sign off digital communications and should keep adequate records of significant communications. In its Finalised Guidance, the FCA explains that the same sign-off and record-keeping provisions in the FCA conduct of business sourcebooks that apply to all forms of media generally, also apply to digital (including social) media.⁶ The FCA also expects firms to perform a risk management analysis⁷ to determine which communications to keep records of, bearing in mind the possibility of evidence being required to deal with queries and complaints in the future.

Other regulatory issues

The FCA reminds firms that adverts should adhere to the provisions of the Committee of Advertising Practice code. The FCA also reminds firms that its rules apply to financial promotions that have effect in the UK, but that other rules may well apply as digital (including social media) communications transcend national borders.

Final thoughts

The FCA concludes the Finalised Guidance by announcing that it will publish a Discussion Paper that explores how the FCA and industry can work together to deliver information to consumers about products and services in a more efficient way. The FCA also invites stakeholders to share with it any research and ideas for improving the delivery of information to consumers.

Our client alert, which summarises the key principles of the UK's financial promotions regime, is available [here](#).

NOTES

1. Financial Services and Markets Act 2000 (s. 21)
2. Principle 7 of the FCA Principles of Business
3. Conduct of Business Sourcebook (**COBS**) (s.4), Mortgages Conduct of Business Sourcebook (**MCOBS**) (s.3), Insurance Conduct of Business Sourcebook (**ICOBS**) (s.2), Banking Conduct of Business Sourcebook (**BCOBS**) (s.2) and Consumer Credit Sourcebook (**CONC**) (s.3)
4. Image advertising is different to the insertion of images solution discussed above.
5. When making unsolicited promotions, firms should have regards to Regulations 21 and 22 of the Privacy and Electronic Communications Regulations 2003, COBS 4.8, MCOB 3.7 and CONC 3.10.
6. The FCA draws attention to the Senior Management Arrangements, Systems and Controls manual (**SYSC**) 3 and 4 generally, but particularly SYSC 3.1.6R, 3.2.6R, 4.1.1R and 4.3.1R, as well as COBS 4.10, MCOB 3.9 and 3.11, and ICOBS 2.2.3R
7. Including legal, reputational and regulatory risks.

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