

Client Alert

25 March 2015

UK's Financial Services Regulator Releases Guidance on Financial Promotions in Social Media - Says No to Hashtags

By Susan McLean

Earlier this month the UK's financial services regulator, the Financial Conduct Authority (FCA), issued its final guidance on financial promotions made via social media channels.

As we reported last year in our alert, "[UK's Financial Services Regulator Issues Draft Guidance on Social Media – Should we Favourite* or #Fail?](#)", in August 2014 the FCA issued long-awaited draft guidance on the use of social media in financial promotions by regulated financial institutions. Following the publication of the draft guidance, the FCA held a consultation exercise which closed on 6 November 2014. In response to feedback from regulated firms and industry bodies, in the final guidance the FCA has clarified a few areas and amended portions of the text, as well as added more visual examples.

Very little has changed in the final guidance with respect to the FCA's approach to regulating promotions in social media. The overarching principle for all communications with consumers is that they must be "fair, clear and not misleading" and the FCA's view remains that its rules are, and should be, media neutral. It believes that to take any other approach would create a more complex and costly regime.

However, there is one notable amendment in the final guidance. In the draft guidance, the FCA had suggested using a hashtag #ad to help identify promotions. In the final guidance, the FCA has done an about turn and stated that the use of hashtags is not an appropriate way to identify promotional content.

KEY RECOMMENDATIONS

The recommendations detailed in the final guidance include the following.

- **Form of communication**

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. 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).

- **In the course of business**

Some communications will not include an invitation to engage in financial activity - for example, communications solely relating to the firm's community work. Only financial promotions made "*in the course of business*" will be subject to the FCA guidance. The definition laid down in the guidance effectively requires a commercial interest on the part of the firm. The FCA provides a couple of examples to illustrate the issue.

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Firstly, 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.

Secondly, where a personal social media account is used by someone associated with a firm, that firm 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. During the consultation exercise, further guidance was requested as to the difference between personal and business communications. The FCA clarified that if an employee of a firm uses their own social media account to send communications that could be considered an inducement or invitation then this may constitute a financial promotion and will therefore be subject to the same rules that apply to the firm. Accordingly, firms will need to ensure that their social media policies and training cover the risks of personal social media use.

- **Hashtags**

All financial promotions made via digital media must be clearly identified as such. In the original draft guidance the FCA suggested using a hashtag #ad to help identify promotions. However, in the final guidance, in response to feedback, the FCA has reversed its stance and stated that hashtags are not an appropriate way to identify promotional content. This is based on a few factors.

Firstly, the FCA believes that most promotions on social media will be self-evident. For example, paid-for advertising on various social media platforms already indicates that a communication is promotional (e.g., on Twitter 'promoted by', on Facebook 'SPONSORED'). Secondly, the nature of a hashtag means that if the consumer looks up that hashtag the consumer will be presented with a whole series of communications unrelated to the firm. The FCA believes that this could lead to consumer confusion.

The FCA has also explicitly stated that hashtags would be inappropriate for the inclusion of risk warnings (e.g., #capitalatrisk) or to highlight jurisdictional limitations (e.g., #UKinvestors). The FCA has suggested that signposting of a tweet will only be appropriate where the promotion is obscured or combined with other content (e.g., a celebrity endorsement or native advertisement).

It seems surprising that the FCA did not appreciate how hashtags worked until now. In addition, given that a consumer who regularly uses Twitter is likely to be familiar with how hashtags work, would a consumer really be confused by the use of #ad? Nevertheless, given the position taken in the guidance, if companies have been widely using hashtags in connection with financial promotions they will need to rethink their approach.

- **Re-tweets**

The FCA has confirmed that when a communication is re-tweeted or shared, the responsibility lies with the person who sends the communication. Accordingly, if a consumer re-tweets a firm's promotional communication and is not acting in the course of business, then it is only the original communication that will need to be compliant with the promotion rules. The firm would not be responsible for the re-tweet.

Where a firm re-tweets, shares, or likes a consumer's communication, whether this is a financial promotion or not will depend on the content of the tweet. For example, if the tweet praises the firm for good customer

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service, the FCA has confirmed that would not be a promotion because customer service is not a controlled activity. Whereas, if a customer is endorsing the benefits of a particular product, then re-tweeting, sharing or liking that tweet would constitute a promotion. Accordingly, firms will need to ensure that training for their social media operators deals with the potential risks of sharing positive customer comments.

- **Images**

Risk warnings must be suitably prominent in social media promotions. 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 with the guidance. Of course, social media often poses particular challenges because of space and 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.

- **Signposting**

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. The FCA has rejected that compliance should be assessed based on the combination of a tweet and the website to which it links. This form of 'click-through' approach was proposed by a number of respondents during the consultation period. The FCA is of the opinion that the tweet and the website are separate financial promotions and so each tweet needs to be compliant, even if the tweet has been created to point the consumer to the firm's website.

- **Image advertising**

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.

- **Likes**

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.

- **Systems**

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.

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CONCLUSION

The final guidance does not introduce any major surprises. 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.

Some firms may have been holding back from becoming fully engaged on social media in anticipation of this final guidance. Such firms may be disappointed that the guidance is not more detailed and does not give them the regulatory certainty that they were hoping for, but that's really not surprising - FCA guidance is rarely prescriptive.

In any case, firms can't afford to wait any longer to take the plunge. Increasingly consumers want to engage via social media and with the rise of FinTech, we are seeing a whole host of new competitors moving into the financial services market, many of whom are potentially more agile and better equipped in terms of a digital strategy than the traditional finance brands. While organisations need to be careful to comply with the relevant laws and regulations, they also need to get on board with social media if they do not want to be left behind.

Social media may be a new method of communicating with customers, but compliance risks are not insurmountable. Firms need to exercise the same risk-balancing that they use with other types of media. It's a case of putting in place appropriate guidance, policies and procedures to adequately address the risks, while not overly restricting the firm's ability to be up-to-date in terms of its promotional campaigns.

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