FCA's new guidelines on financial promotions using social media

KEMP LITTLE

KEMP LITTLE

Contents

KEMP

LITTLE

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New FCA guidelines regarding the use of social media by regulated financial sector firms were published on 6 August[1]. Financial sector firms had been keenly anticipating the FCA's release of this highly topical guidance.

Despite the increased popularity with financial sector firms of social media as a marketing , including Facebook, Twitter and LinkedIn, the financial sector has been constrained by the need for compliance in terms of its use for promotional and customer relationship purposes.

Those firms using or considering using social media - which in practice probably means all firms - should consider this guidance as it talks frankly about challenges and workarounds, providing firms with some genuinely useful examples of what will – and will not – be compliant.

Notably, the FCA seems to have itself embraced the space-limited social media approach in producing this guidance – compared to the usual FCA output this document is mercifully short, readable and contains plenty of images to illustrate by example.

The FCA states that its guidance affects “those in the regulated community using, or wanting to use social media for their communications with customers”. In fact, however, the guidance is also highly relevant for firms or individuals on the perimeter of the regulated community. These firms and individuals may be uncertain whether – or simply unaware – that their social media communications fall within the definition of financial promotions – and thus breaching the restriction prohibiting their communication by unauthorised legal or natural persons.

Increase in use of social media for financial promotions

There are reports that the last eighteen months have seen an increase in the use of digital media for financial promotions. This is really not surprising as financial firms are undoubtedly having to increase their use of digital media for financial promotions as the result of consumer expectations and the fact that the market is more competitive than ever, with an ever increasing flow of new innovative and alternative finance service providers.

This trend is bound to gather even more strength given the currently immense political and regulatory drivers for financial technology innovation. Also, firms rightly recognise that social media is a powerful channel which allows them to reach a wider audience.

[1] GC14/6 Social media and customer communications: The FCA’s supervisory approach to financial promotions in social media

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LITTLE

Key points for firms to take from the consultation

An important point for firms to remember is that the FCA's rules are intended to be media-neutral, meaning any form of communication - including through social media – can be a financial promotion. So the fundamental requirement that all communications are "fair, clear and not misleading" and all the other requirements, for example for risk warnings – apply to social media just as they do for any other media.

And each communication – for example a tweet – needs to be compliant on a standalone basis. It is not acceptable to simply provide another source or link for more detailed information or risk warnings.

Financial firms' concerns around their use of social media

Financial firms have undoubtedly had concerns about whether - and how - they can use social media while complying with the FCA's rules - especially in the case of space-limited forms of media such as Twitter. Some firms' uncertainty about how the FCA will apply its rules to social media in practice may have made them hesitant to embrace the phenomenon. What firms want from regulators generally and in this case is certainty and not to be put at a competitive disadvantage.

The challenge for regulators is that digital marketing is evolving faster than their ability to identify and manage the risks. Equally, global firms need to comply with cross border rules. A tweet can't be restricted to a single jurisdiction.

Specific challenges for firms and potential workarounds

Space-limited forms of media such as Twitter undoubtedly present challenges for firms to use while remaining compliant with the FCA's rules but these are not necessarily insurmountable. Generally speaking, there is no reason why, say, a tweet cannot be "fair, clear and not misleading", conveying a prominent warning within the character limitation. However, firms are likely to have to accept that space-limited media is unlikely to ever be appropriate as a means of promoting complex features of financial products or services.

Firms should also bear in mind that there are specific requirements to include risk warnings or other statements in promotions for certain products/services which pose particular challenges for the use of character-limited social media. However, workarounds do exist. For example, it may be possible to signpost a product or service with a link to more comprehensive information, provided that the promotion remains compliant on a standalone basis.

Another possible solution to the problem of character limitation is to insert images, including the use of infographics, into communications such as tweets, which allows relatively unrestricted information to be conveyed so long as the image must in itself be compliant. However, firms should bear in mind that where there is a need for a financial promotion to include a risk warning or other information required by the FCA rules, this cannot appear solely in the image as the functionality that allows an image to be visible may be switched off, so that the image appears simply as a link. ‘Image advertising’ is defined as advertising that only consists of the name of the firm, a logo or other image associated with the firm, a contact point and a reference to the types of regulated activities provided by the firm or to its fees or commissions.

Firms can also tweet a link to a website with a financial promotion. Naturally in doing so firms will want to encourage or give some reason to the recipient to open the link. That is likely to be acceptable so long as the tweet is standalone compliant.

Employees and risk management

Firms are not only permitting but encouraging their employees to create social media accounts on their behalf and employees will generally oblige in a genuine effort to benefit their employer. But firms really need to keep control and employees - including senior management - need to be made aware that their communications can come under close scrutiny. Firms should consider not only having policies and procedures governing the use and content of social media in place but also making sure that clear messages around the use of social media are regularly reinforced throughout the business.

These social media policies and procedures are needed to maintain compliance and for the protection of businesses and customers alike. As well as thinking about substantive content, firms should ensure their social media policies are consistent with their employment contracts. Firms should also put in place procedures requiring record keeping of social media posts to ensure both corporate and FCA policies have been adhered to. Firms should also conduct regular reviews of content. And even if a firm has written documentation about how employees – executives included – are supposed to behave on social media, it is always good to make plans not only to prevent reputational damage, but also how to react and recover if social media communications go wrong.

Regulatory, reputational and other risks beyond financial promotions compliance

Social media can be a business’s best friend or worst enemy. Every year brings yet more examples of major brands committing now familiar social media mistakes, such as rogue employees posting to social networks, unfortunately timed or inappropriate promotions and scandals caused by careless senior executives. For example, Francesca's Collection, a major publicly traded US retailer, reportedly fired its CFO for sharing inside information after he revealed non-public company information using his personal account to tweet "Board meeting. Good numbers=Happy Board," six days before the company filed its annual report with the SEC. The risk of social media misuse is not helpful in any company but can be particularly devastating in a regulated financial sector firm.

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Impact of FCA guidelines on social media on innovation by firms

It is unlikely that the guidelines will limit innovation by firms. On the contrary, the guidelines are positive in that they clarify and confirm the FCA's approach and will help firms understand how they can use social media in compliance with the FCA's rules.

The FCA expressly recognises that there are significant potential benefits from the use of all digital media by firms, provided this is responsible and customer-focused, and it is hard to argue with this approach.

Conclusion and action points for firms

Getting social media strategies right can be a great way for a business to engage with its target market. However, firms should use social media wisely, by ensuring that they have policies and procedures in place to ensure that content does not breach the FCA's financial promotions rules and that all staff understand the importance of sticking to the rules. Firms should make sure they know who has overall and day-to-day responsibility for use of social media and that senior management have proper ownership of the firm's social media strategy.

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