

Be careful what you say

Avoiding common pitfalls in social media marketing

Digital Financial Services

Social media presents its own challenges for firms seeking to send out compliant marketing to their customers.

The position became clearer when FCA Guidance was published in March 2015 but it is not the complete picture. The FCA Guidance applies specifically to communications which constitute "financial promotions". However, financial institutions must also ensure that all of their advertising – even where it is generic brand focused marketing – complies with ASA guidelines and other advertising principles.

We focus on a reminder of the key principles and rules for banks and other financial institutions to follow with their social media campaigns, and highlight common pitfalls.



Common pitfalls

These are areas where businesses can easily fall foul of the FCA, the ASA or third party IP rights:

Standalone compliance - the FCA emphasises that each communication (for example a tweet or a Facebook post) that is a "financial promotion", needs to be considered individually and comply with the relevant rules. This is the case even when a firm uses a click through approach, for example when tweets link through to a website.

User generated content – favourable comments from customers about a firm's products or services that are then reused (for example, retweeted or placed on its website) must be factually correct and capable of substantiation.

Comparative advertising – comparative advertising must not mislead or be unfair. A firm must objectively compare material, relevant, verifiable and representative features of its products. Comparisons must be on a "like-for-like" basis. Firms do not need to use the name of a competitor for the advert to be deemed to be comparative and be caught by the relevant provisions.

Personal or business? – a person can still be acting in the course of business even if they send out information from their personal social media accounts. The individual and the firm should distinguish clearly between personal and business communications.

Using third party names – there is a risk of a trade mark infringement claim when using the name of a competitor or another brand or their products in a comparative advert, if it is found to be unfair or misleading.

Puffery - firms should be wary of using "puffery" in their advertising as the ASA might deem such statements to be a factual superiority claim. That means that if the statement cannot be substantiated then it will be in breach of the CAP Code.

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FCA Guidance

The "FCA Guidance on Social Media and Customer Communications" (the FCA Guidance) reminds firms that all communications including financial promotions must be clear, fair and not misleading and that FCA rules are media neutral, meaning they apply equally to social media.

Further principles relating to financial promotions in social media include:

- **Risk warnings** – an FCA concern has always been that social media is often character-limited and this poses challenges for including risk warnings or other statements in promotions and, as a result, may not be appropriate for promoting complex features for certain products/services. One approach is to use images such as infographics in communications. As images can often be switched off, appearing simply as a link, risk warnings or other information required under FCA rules should not solely appear in the image.
- **Use of hashtags** - hashtags such as "#ad", "#capitalatrisk", "#pastperf", "#UKinvestors" are inappropriate to identify promotional content, risk warnings or jurisdictional limitations of products because the user could be directed to information that is not relevant to the firm's communication.
- **Beware of sharing or forwarding communications** - where a recipient of a communication shares or forwards it (for example by retweeting), the responsibility lies with that recipient as the communicator. However, any non-compliance in the original communication remains the responsibility of the originating firm. Firms should take steps to label and target communications to mitigate the risk of them being re-communicated outside the initial target audience.
- **Approval and record-keeping** - firms must have an adequate system in place to sign off and record digital media communications. Sign-off should be by someone of appropriate competence and seniority.

ASA Guidance

The FCA Guidance focuses on the technical aspects of adhering to rules on financial promotions. Firms must also adhere to the CAP Code in relation to the non-technical elements of financial advertising using social media.

All marketing communications:

- should be prepared with a **sense of responsibility** and should reflect the spirit, not merely the letter, of the CAP Code
- should be **legal, decent, honest and truthful**
- must be **obviously identifiable** as marketing communications
- must **not contain anything that is likely to cause serious or widespread offence or cause distress**

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