HFW

INSURANCE BULLETIN
APRIL 2024

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REGULATION

Do you know your influencers from your "finfluencers"? FCA guidance on financial promotions on social media

The FCA has published updated guidance (FG24/1)[1] on its expectations of firms and others on communicating financial promotions on social media. It makes clear that financial promotions must comply with the rules on a standalone basis, provide a balanced view of benefits and risks and communicate information that will help consumers make effective, well-informed decisions.

An April 2024 study by Forbes Advisor showed that 9% of current UK private life insurance policyholders chose their provider and policy through a social media influencer.[2] Therefore, this guidance will apply to a material portion of the market.

We set out some key points of the guidance, including with regard to influencers and social media, in more detail below.

What is a financial promotion?

The effect of section 21 of the Financial Services and Markets Act 2000 (FSMA) is that a person must not, in the course of business, communicate an invitation or inducement to engage in investment activity unless that person is an authorised person, the invitation/inducement has been approved by an authorised person, or an exemption applies.[3] A breach of the restriction (i.e. communicating an illegal financial promotion) is a criminal offence.

Any form of communication has the potential to be a financial promotion. This includes communications on social media (such as a post or a meme) or through private chat rooms.

Financial promotions must also comply with the FCA's relevant rules, which generally require communications to support consumer understanding and to be fair, clear and not misleading.[4] Where firms are communicating or approving financial promotions that are likely to be received by retail customers, firms must also ensure that that communications deliver good outcomes for those customers in satisfaction of the Consumer Duty. Fines or other enforcement action can be taken against firms and individuals who comply with section 21 of FSMA but breach the FCA Handbook's financial promotion rules (i.e. communicating or approving a legal, but non-compliant, financial promotion).

Guidance on compliance with the financial promotion rules

Financial promotions must be standalone compliant, meaning that each communication must individually comply with the FCA's financial promotion rules. In particular, the FCA expects social media financial promotions for complex products to include clearly identified hyperlinks or other means of access to additional supporting information to support consumer understanding and decision-making. Promotions should also provide a balanced view of the benefits and risks of a promoted product or service. If something is communicated on a dynamic platform such as Instagram stories, the promotion as a whole will be considered, depending on where and in how many frames important information is displayed.

1 FCA Finalised Guidance FG24/1 can be accessed here: https://www.fca.org.uk/publication/finalised-guidance/fg24-1.pdf

2 The results of the Forbes Advisor study can be accessed here: https://www.forbes.com/uk/advisor/life-insurance/life-insurance-statistics/

3 Guidance on the scope of the financial promotion regime, including what constitutes a communication "in the course of business" or "to engage in investment activity", is set out in FG24/1 and PERG 8 of the FCA Handbook.

4 The FCA's financial promotion rules are set out in various parts of the Handbook, including ICOBS 2 in respect of insurance firms.

Certain information (as specified in the FCA's relevant sourcebooks) must be displayed in a prominent way. Firms must consider the target audience and their likely information needs.[5] The formatting and display of social media (e.g. headings, layout, font and graphics) should be used to ensure that information is presented prominently. Firms should ensure that information required to be displayed prominently cannot be obscured by truncated text features (such as "see more…") or any other optional action to view the information. Firms must also consider whether certain social media is appropriate at all, particularly where products and services have complex features that are hard for consumers to understand.

Where the Consumer Duty applies (i.e. where a firm is communicating or approving financial promotions which are likely to be received by retail customers), firms must consider how using a digital marketing strategy delivers a good outcome for consumers. The Duty requires firms to identify a target market and tailor communications to account for the characteristics of that market, which may be practically difficult to do on social media. For example, firms should consider whether a promotion for a professional target market is appropriate at all on forms of social media with limited ability to control who sees it. Finally, the FCA has noted that, in contravention of the duty to act in good faith as required by the Duty, consumers can be bombarded on social media with financial promotions for the same service or from the same firm. As such, firms should avoid using advertising tools on social media platforms which seek to exploit consumers' vulnerability to excessive contact.

Influencers and "finfluencers"

The FCA has seen harm from social media influencers communicating non-compliant or illegal financial promotions. The FCA has identified the following three types of influencers, all of which are capable of communicating a financial promotion (irrespective of the size of an influencer's following on a social media platform):

- Celebrity influencers who are not associated with financial services but may be paid to use their presence to promote companies with a business interest in people making certain financial decisions.
- "Finfluencers" who might share opinions and recommendations on digital platforms and, in effect, provide financial advice but may not be authorised by the FCA to do so.
- Chat groups on forums like Reddit and Telegram may, for example, be used to encourage participants to engage in personal chats where financial advice or products are sold or to promote specific products or services via memes.

Firms' responsibilities when approving influencers' financial promotions

Firms approving the financial promotions of influencers (of whatever type) should consider the influencer's audience demographics and whether the audience is likely to have characteristics of vulnerability.

The FCA has seen cases of influencers communicating financial promotions without the firm or influencer realising that the communication is a financial promotion. One reason for this could be that the firm and/or influencer have wrongly assumed that there must be direct compensation for the social media post or chat to be "in the course of business" and to fall within the financial promotion restriction under section 21 of FSMA. However, the FCA has clarified that any underlying commercial interest could result in a promotion being caught by the restriction. The FCA's guidance provides a number of scenarios where an influencer would be "acting in the course of business" in respect of promoting a firm's services or products.

Is time TikToking for firms?

The FCA has confirmed that the guidance does not create new obligations for those who promote financial products and services on social media. However, the guidance does indicate how firms should approach compliance with their existing regulatory obligations.

As social media becomes an increasingly important part of firms' marketing strategies, firms should be mindful that the FCA's financial promotion rules are technology-neutral and apply across all channels used to advertise, including social media. In particular, firms should avoid poor quality financial promotions being communicated on social media which can lead to consumer harm.

There may also be other relevant duties to consider, such as under the Online Safety Act and under social media platforms' own rules.

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5 When assessing the prominence of information communicated on social media, firms should also consider the FCA's existing guidance on prominence in financial promotions, which can be accessed here: https://www.fca.org.uk/publication/finalised-guidance/fg-fin-proms-prominence.pdf

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"The government was keen to encourage apologies as a means of reducing civil disputes and so section 2 of the Compensation Act 2006 was enacted... However, the purpose of the provision, to encourage apologies, does not seem to have been fulfilled."

DISPUTES

Sorry seems to be the hardest word

The Ministry of Justice (MoJ) has recently published a consultation on reforming the law of apologies in civil proceedings in England & Wales.

Background

Apologies in civil disputes and litigation are not thought to be common in England & Wales, which the consultation notes is because defendants are very concerned that an admission of liability would weaken their case.[1]

The government was keen to encourage apologies as a means of reducing civil disputes and so section 2 of the Compensation Act 2006 was enacted which provides that *"an apology, an offer of treatment or other redress, shall not of itself amount to an admission of negligence or breach of statutory duty"*.

However, the purpose of the provision, to encourage apologies, does not seem to have been fulfilled. The consultation sets out that parties still have concerns about the effects of apologising, including the potential effect on their insurance coverage.

The current consultation is a result, in part, of the introduction of a Private Members' Bill in 2020 seeking reform in this area, which did not make it through Parliament before the end of the session (and therefore was abandoned), as well as recommendations of the Inquiry on Child Sexual Abuse.

Proposals

At the moment, no detail of the proposed legislation is set out, and the MoJ is seeking evidence on how the current law is used or why it is not used, and views on the merits of introducing further legislation in this area.

The consultation notes that various common law jurisdictions have apology laws, including Scotland. The consultation specifically asks whether English law should take the same approach as Scottish law.

The Apologies (Scotland) Act 2016 provides: *"In any legal proceedings to which this Act applies, an apology made (outside the proceedings) in connection with any matter—(a) is not admissible as evidence of anything relevant to the determination of liability in connection with that matter, and (b) cannot be used in any other way to the prejudice of the person by or on behalf of whom the apology was made."*

An apology is specifically defined in the Act as: *".. any statement made by or on behalf of a person which indicates that the person is sorry about, or regrets, an act, omission or outcome and includes any part of the statement which contains an undertaking to look at the circumstances giving rise to the act, omission or outcome with a view to preventing a recurrence"*.

The Act applies to all civil proceedings apart from certain exceptions, including defamation and public inquiries.

The consultation notes that although the Scottish Government has no firm data on the impact of the Act, it is acknowledged to be quite low.

The consultation also notes that there is a law of apology in Hong Kong, which goes significantly further than in Scotland, contained in the Apology Ordinance passed in 2017. This prescribes that an apology will not constitute an admission of fault or liability even if it includes such an admission, and nor may the admission be admissible in evidence to the detriment of the apology maker. The statement of fact included in an apology will in most cases also be inadmissible, although it may be admitted at the discretion of the decision maker if it is *"just and equitable"* to do so having regard to the *"public interest or interests of administration and justice"*. The Ordinance also provides that an apology will not void or otherwise affect any insurance cover for any person in connection with the matter,

1 Although the consultation notes that there is little empirical evidence on this issue.

regardless of anything to the contrary in any agreement.

The consultation states that the MoJ is not minded to take the same approach as in Hong Kong, and that doing so may have unintended consequences. It might also require amendments to other legislation such as that relating to limitation periods, as well as potentially causing duplication for claimants who would have to prove the facts contained in an apology.

Finally, the consultation also asks whether the Compensation Act provision on apologies should be extended to include vicarious liability cases.

Impact on parties and their insurers

It is undoubtedly the case that in certain types of disputes, the claimant's key aim is an acknowledgement of the consequences that the defendant's actions had on them. Therefore, a swift apology can bring a satisfactory end to a dispute without the need for protracted litigation, and sometimes can restore relations between the parties. Encouraging parties to apologise where appropriate is therefore a very sensible aim.

However, there are difficulties. It is likely to be tricky for the legislation to get the balance between the interests of claimants and defendants right, so that on the one hand it offers enough protection that defendants feel able to make use of the legislation, but on the other it does not render that apology of little practical use, or somewhat hollow to a claimant. The fact that other jurisdictions have seemingly found this tricky is telling.

In terms of the insurance position, third party liability policies are likely to contain terms such as a requirement that the insured does not admit or assume liability without the insurer's consent, or does not do anything to prejudice the defence of the claim against them, which may well be engaged by an apology. If new legislation does proceed, insurers will need to consider its effects in conjunction with the terms of their policies. The consultation indicates that responses have been sought from the insurance industry, including the ABI.

Next steps

The consultation is open until 3 June 2024. It is clear from the consultation that the MoJ is considering whether any changes should take place at all or whether further legislation is unlikely to have an impact, as well as what any changes should be. The consultation specifically notes that there may be alternatives to legislation, such as changes to the Civil Procedure Pre-action Protocols or formal guidance. We wait to see the next steps.

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