UKBAA

UK Business Angels Association

FCA issues new draft guidance on financial promotions made via social media

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Last month, the FCA published draft guidance on how its financial promotion requirements apply in the context of promotions made via social media.

The guidance (if taken forward) will supersede the FCA's existing guidance on the same topic which was published in 2015 and the update has been driven by a recognition that the nature and proliferation of social media has evolved considerably over the past eight years.

So, what are the principal themes of the new guidance and to what extent should UKBAA members need to consider such guidance as part of their own activities?

Results from the FCA's recent quarterly data and commissioned surveys have confirmed a pattern which was already well suspected; that social media channels such as YouTube, Tik Tok and Instagram are increasingly being used as mediums for the communication of financial promotions. Often, the standard of those promotions falls well short of the FCA's requirement to be 'clear, fair and not misleading' (and so are 'non-compliant' promotions) and/or are communicated by unauthorised firms without reliance on any exemptions (and so are simply illegal promotions).

Younger consumers can be easily and quickly targeted by such promotions, a group who typically have limited investment experience and so are at risk of trusting 'financial influencers' and being induced by posts which advertise attractive returns with the associated risks either obscured or missing entirely.

The draft guidance re-confirms that *any* form of communication (including through social media) is capable of being a financial promotion if it includes an invitation or inducement to engage in investment activity. Communications via both public and invitation-only platforms can therefore be caught, as well as memes, reels, and chatrooms (e.g., Discord, Slack and Telegram).

A commercial interest on the part of the communicator must also exist, however it need not necessarily be a direct interest (and is intended to capture any level of commerciality). Financial influencers promoting the services of third-party financial firms to their followers via affiliate links embedded in their posts or in chatroom exchanges for instance are therefore particularly susceptible to being caught offside by the rules if they stand to be compensated in some way for such promotion.

Prominence of risk warnings is of particular focus in the new guidance. Poor practices and platform design features can be guilty of lacking balance between the promotion and the risk warning, with the latter either featured in smaller text than the promotional text, obscured behind an ellipsis ('see more'…), or appearing only at the very end of video content rather than being prominent throughout.

The specific wording required for risk warnings (even for character-limited media such as Twitter) relevant to high-risk investments is also relatively inflexible, a sweeping change of the financial promotion rules at the turn of the year meant that no longer is it simply compliant to tag "Capital at risk" to the end of a social media post which constitutes a financial promotion. Some high-risk investments are even banned completely from being marketed to retail consumers (such as collective investment schemes and speculative mini bonds). We covered those changes at the time here.

Firms using social media as a marketing strategy for their products or services or approving promotions for unauthorised persons doing the same are reminded that the new Consumer Duty comes into force as of this week. The new standards imposed by the duty mean that firms are obliged to consider whether their strategies deliver good outcomes for retail consumers (and not just whether the promotions themselves are clear, fair, and not misleading), even those consumers for whom the firm has no direct relationship with (i.e., the net is cast much wider than simply direct 'followers'). That being the case, firms are advised to consider whether they are supporting retail consumers in their decision-making as part of their social media strategy and if the channels and platforms which they communicate through are compatible with both the target audience the firm is seeking to reach and the complexity of its products or services being promoted.

Finally, it's worth noting that the act of sharing or forwarding a social media post which constitutes a financial promotion does not eliminate any original non-compliance on the part of the promoter. Given the ease and speed with which social media posts can be redistributed to others, and often the lack of control on restricting such redistribution, firms and unauthorised persons should be vigilant as to the wider audience which may ultimately view their promotions.

As to potential impact and key takeaways, the following is a non-exhaustive list of summary considerations. If you are promoting investments via social media either exclusively or as part of a wider marketing strategy, it's certainly worth reading the draft guidance in full and if in any doubt as to how the guidance and rules apply to your activity, then do feel free to get in touch.

- This is draft guidance only, no new rules are imposed as a result of the guidance although the final promotion regime for FCA firms has recently undergone significant changes (High Risk Investments, Consumer Duty) and we are also expecting changes to the statutory financial promotion rules in the near future (changes to HNWI and sophisticated investor exemptions).

- Rules on financial promotion capture everyone (but different rules apply depending on whether you are FCA-authorised or non-FCA authorised) and every medium (i.e., all social media).

- Consider whether there is any direct or indirect commercial self-interest behind your promotion(s); if there is and the promotion is an invitation or inducement for others to engage in investment activity, the posts are likely to be financial promotions and restrictions will apply.

- Is social media actually suitable for your promoted product or service? If only intended for a restricted target market and/or there is complexity involved, then you may be better served with using social media simply as a signpost (with image advertising only) to a more appropriate forum (such as your website) or simply not use social media at all.

- Keep adequate records of all financial promotions either made by you or (where authorised to do so) approved by you on behalf of others (either physically or your own cloud-based database but not on third-party platforms).

- Consider whether any financial promotions communicated or approved by you are not only satisfying the basic requirement to be clear, fair, and not misleading but are also helping to inform retail consumers in their decision-making in the spirit of seeking to deliver good outcomes for them.

The FCA is seeking feedback to its proposed guidance until 11 September 2023. If you would like to submit feedback you are able to do so here. The FCA intends to finalise their draft guidance by the end of the year.

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