

Guidance consultation

Social media and customer communications

The FCA's supervisory approach to financial promotions in social media

August 2014

1 Social media and customer communications

Introduction

- 1.1 Firms' use of digital channels to communicate with their customers is not a new development. As far back as 2010, the Financial Services Authority (FSA) published guidance on the use of these media. However, digital media are now becoming the media of choice in many cases for customer communications and specifically for financial promotions. More particularly, firms are using, or wanting to use, social forms of digital media (social media) for their communications with customers.
- 1.2 A number of these media have character limitations which can constrain their use. We are aware that in some circumstances firms may legitimately want to use certain media but perceive difficulties in complying with some of our rules, particularly with our financial promotion rules.
- 1.3 The statement set out in chapter 2 of this Guidance Consultation is intended to clarify and confirm our approach to the supervision of financial promotions (as defined in the legislation) in social media, including its character-limited forms. We propose this as guidance to help firms understand how they can use these media and comply with our rules. Some of this proposed guidance will be relevant also to broadcast and print media.

- 1.4 We remind firms that our rules are intended to be media-neutral to ensure that consumers are presented with certain minimum information, in a fair and balanced way, at the outset of firms' interaction with them. Our rules include sector-specific requirements but in each case there is an overarching principle that any communication should be fair, clear and not misleading.
- 1.5 We have developed this proposed guidance following engagement with other regulators both in the UK and overseas and other interested stakeholders. We have also had significant contact with industry over the course of the last year to better understand their concerns about the use of social media.

FCA objectives: consumer protection and competition

- 1.6 Our objectives include promoting effective competition in the interests of consumers, as well as consumer protection. Digital media can allow new and smaller firms to have a presence in the marketplace i.e. through a website rather than a bricks-and-mortar operation. Social media specifically may allow businesses to reach a wider audience – particularly but not exclusively among younger age-groups – in a way which increases consumer awareness and knowledge; and, permit two-way communication as well. In principle this can make it easier for consumers to switch providers, and so enhance competition. We therefore see significant potential benefits from the use of all digital media by firms, provided this is responsible and customer-focused.

Consultation and feedback

- 1.7 This proposed guidance is open for consultation, and we welcome comments on it. The consultation will run to 6 November and details of how to respond are outlined in chapter 3 (Next steps).

2 The FCA's supervisory approach: a statement

What are social media?

- 2.1 Social media share the characteristic of being digital and can be defined as 'websites and applications that enable users to create and share content or participate in social networking' (Oxford Dictionaries 2013). The following is a non-exhaustive list:
- blogs
 - microblogs (Twitter)
 - social networks (Facebook, LinkedIn, Google+)
 - forums
 - image and video-sharing platforms (YouTube, Instagram, Vine, Pinterest)
- 2.2 A number of media may impose character limits, or other space or time limitations. These include Twitter (140 characters) and Vine (maximum six-second video loops). Adverts on Facebook have 25 characters for the headline and 90 characters for the body text (although status updates are effectively unlimited). Pinterest is limited to 500 characters. An SMS text message, which could be business-related or purely social, has a limit of 160 characters.
- 2.3 We recognise that social media are particularly powerful channels of communication and therefore of significant value to firms. We do not want to prevent their use. These media allow firms to contact their customers, and vice versa, both pre- and post-sale.

What is a financial promotion?

- 2.4 We remind firms that any form of communication (including through social media) is capable of being a financial promotion, depending on whether it includes an invitation or inducement to engage in financial activity.¹ This could include, for example, 'advergaming', where promotional messages are placed in entertainment applications. Figure 1 below is a non-promotional communication but would constitute a financial promotion if, for example, the second sentence read: 'We also invest in our trading technology, to help get you the best returns!'

¹ By financial activity we mean 'investment activity' as defined in s.21 FSMA. This includes mortgages, insurance, banking and consumer credit, as well as investments in the narrower sense

Figure 1: A non-promotional communication that focuses on the firm's non-regulated activities



- 2.5 A financial promotion must also be made 'in the course of business' to be within our regime. We have published guidance on this in our Perimeter Guidance manual. The 'in the course of business' test requires a commercial interest on the part of the communicator. It is intended to exclude genuine non-business communications. Social media conversations involving groups and individuals not acting in the course of business are therefore outside our regulation.² Where capital is raised for small private companies and the company is already in operation, it will be acting 'in the course of business' when seeking to generate additional capital. At the pre-formation stage, however, individuals who are proposing to run the company may approach friends and relatives to see if they are willing to provide start-up capital. Such individuals will not, in our view, be acting 'in the course of business' during this pre-formation stage, unless they are forming companies with such regularity that they would be regarded as carrying on the business of forming companies.

² PERG 8.5 – see particularly PERG 8.5.3G

In principle, however, there is no reason why an individual, such as a sole trader, cannot act 'in the course of business': the key factor is the purpose of the communication rather than who is making it. However, where a personal social media account (such as a Twitter account) is used by someone associated with a particular business, for example a senior person at the business, that individual and the firm 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.

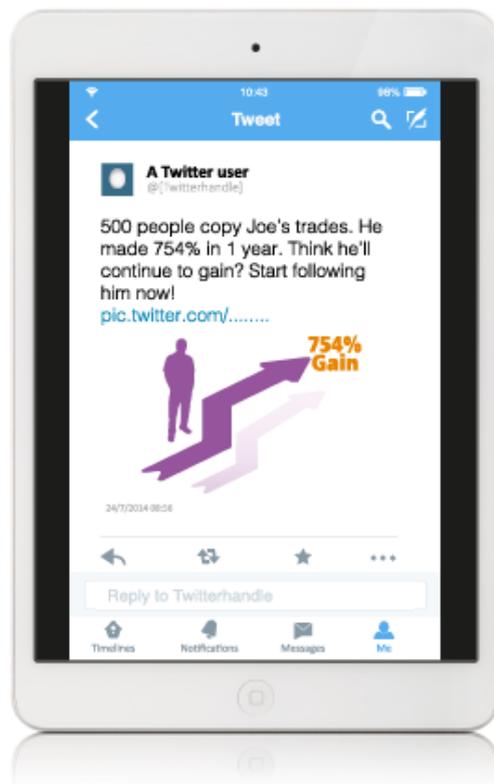
- 2.6 There is a specific requirement that financial promotions for investment products³ are identifiable as such. Our view is that – for social media in particular – it is important that, in all cases, it is clear that a promotion is a promotion. One generally accepted way to do this, for character-limited media, is the use of #ad.

Fair, clear and not misleading

- 2.7 We remind firms that, under Principle 7 of the Principles for Businesses, it remains a fundamental requirement that all communications (including financial promotions) are fair, clear and not misleading. Promotions that fail to be 'fair, clear and not misleading' can pose a risk as they could lead consumers to buy the wrong product – ultimately with unhappy outcomes for them and for firms.
- 2.8 Communications through social media can reach a wide audience very rapidly, so firms should take account of that in their decision to promote through social media, and the nature of their promotions. Firms should therefore ensure that their original communication would remain fair, clear and not misleading, even if it ends up in front of a non-intended recipient (through others re-tweeting on Twitter or sharing on Facebook). One way of managing this risk is the use of software that enables advertisers to target particular groups very precisely.
- 2.9 The requirements to be fair and not misleading imply balance in how financial products and services are promoted, so that consumers have an appreciation not only of the potential benefits but also of any relevant risks. Firms should consider the appropriateness of character-limited media as a means of promoting complex features of financial products or services. It may be possible to signpost a product or service with a link to more comprehensive information, provided that the promotion remains compliant in itself. Alternatively, it may be more appropriate to use 'image advertising' (see paragraph 2.16) to promote a firm more generally. Figure 2 shows an example of a tweet where the promotion lacks balance, as it over-emphasises the benefits and includes an inadequate risk warning. It also fails to comply with the past performance rules as it makes the indication of past performance the most prominent feature, and fails to include performance information covering at least the immediately preceding five years. In addition, it does not clearly identify itself as a promotion.

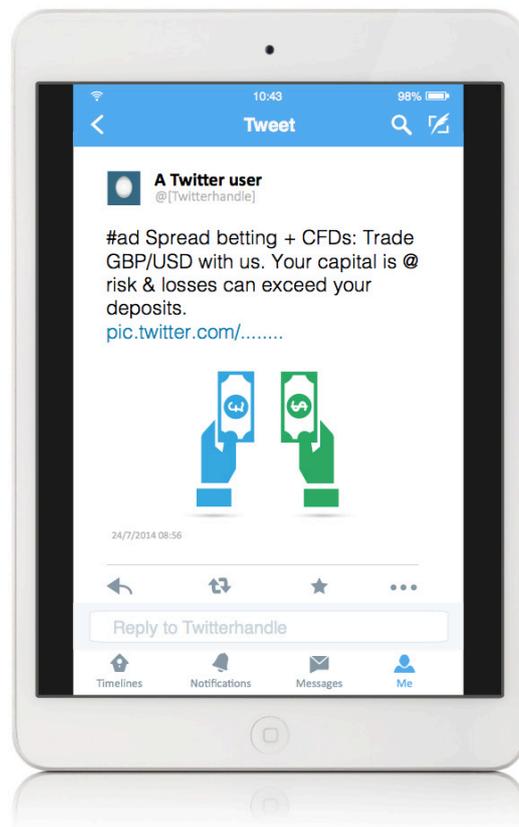
³ COBS 4.3.1R

Figure 2: Example of a non-compliant promotional tweet (see paragraph 2.9)



2.10 We produced guidance in September 2011 setting out our expectations on prominence and providing examples of good and poor practice.⁴ In deciding whether a particular statement meets the rules on prominence, consideration should be given to the target audience, the nature of the product or business and the likely information needs of the average recipient. Targeted consumer testing is an avenue that could be explored to assist with firms' assessments in this area. We remind firms that there are sector-specific requirements in relation to prominence in the relevant sourcebooks.⁵ We look at prominence in the context of the promotion as a whole. Figure 3 shows how this can be achieved using character-limited social media.

Figure 3: Example of a fair, clear and not misleading tweet, conveying a prominent warning within the character limitation



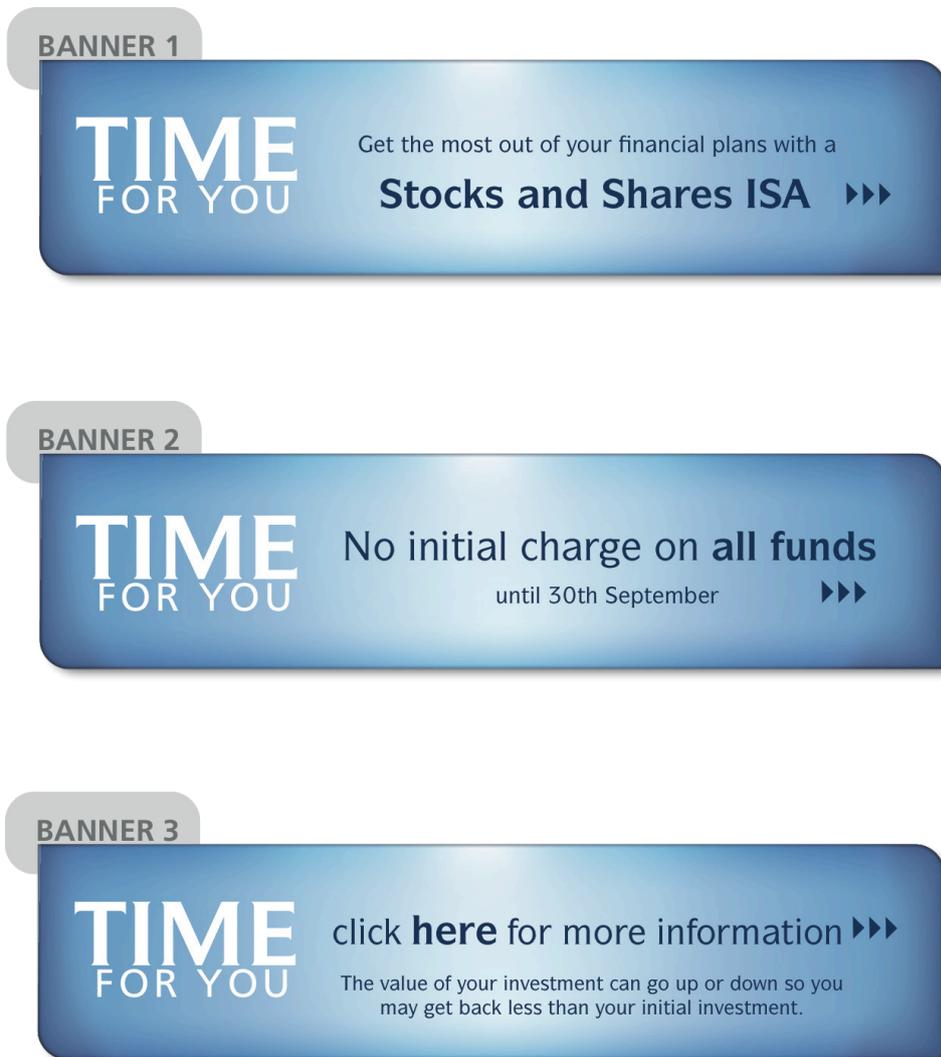
⁴ <http://www.fca.org.uk/static/pubs/final/fg-fin-proms-prominence.pdf>

⁵ COBS 4, MCOB 3, ICOBS 2, BCOBS 2 and CONC 3

Standalone compliance

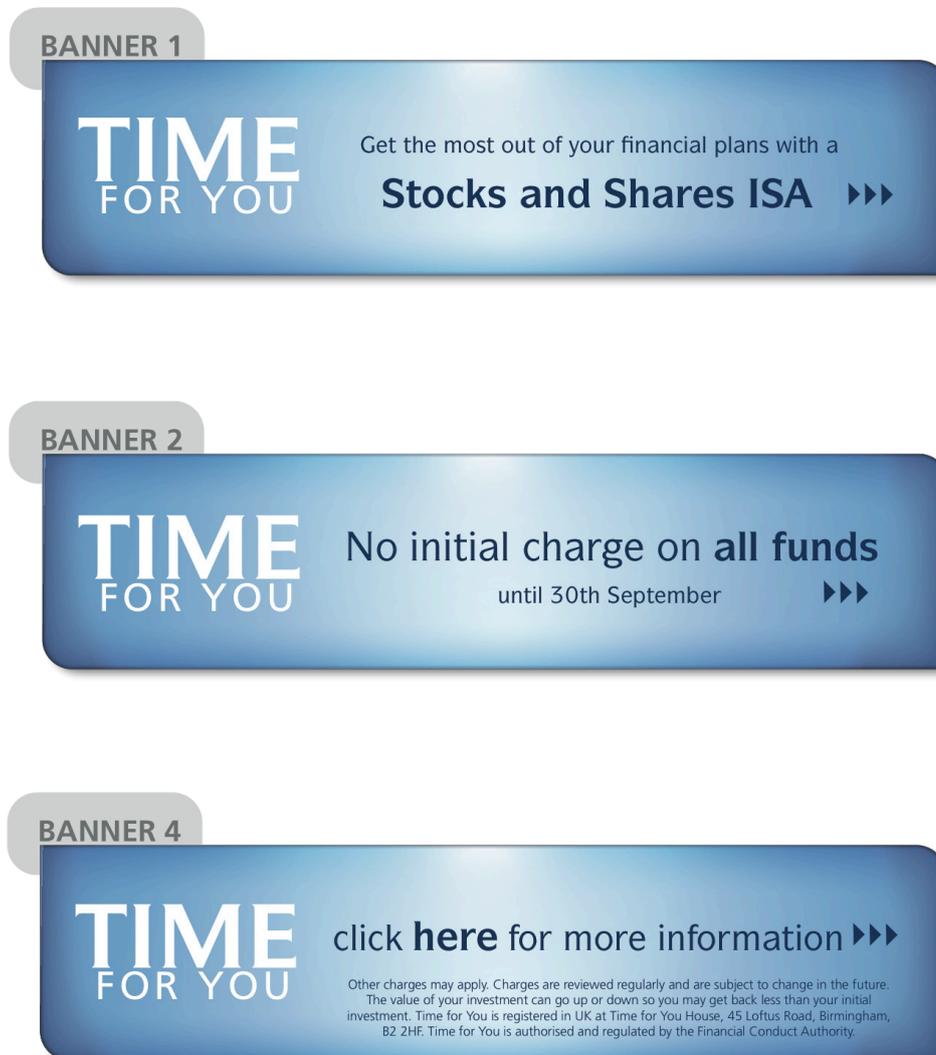
2.11 Each communication (e.g. a tweet, a Facebook insertion or page, or web page) needs to be considered individually and comply with the relevant rules.⁶ Figure 4 shows how this can be achieved through a banner promotion. By contrast, Figure 4a shows a non-compliant version where the risk warning is not clear.

Figure 4: Example of a compliant banner promotion. The risk warning is clear in the last frame of a dynamic banner



⁶ <http://www.fsa.gov.uk/pages/doing/regulated/promo/pdf/compliance.pdf>

Figure 4a: Example of a non-compliant banner promotion. The risk warning is lost in surrounding text, which is also of much smaller font-size

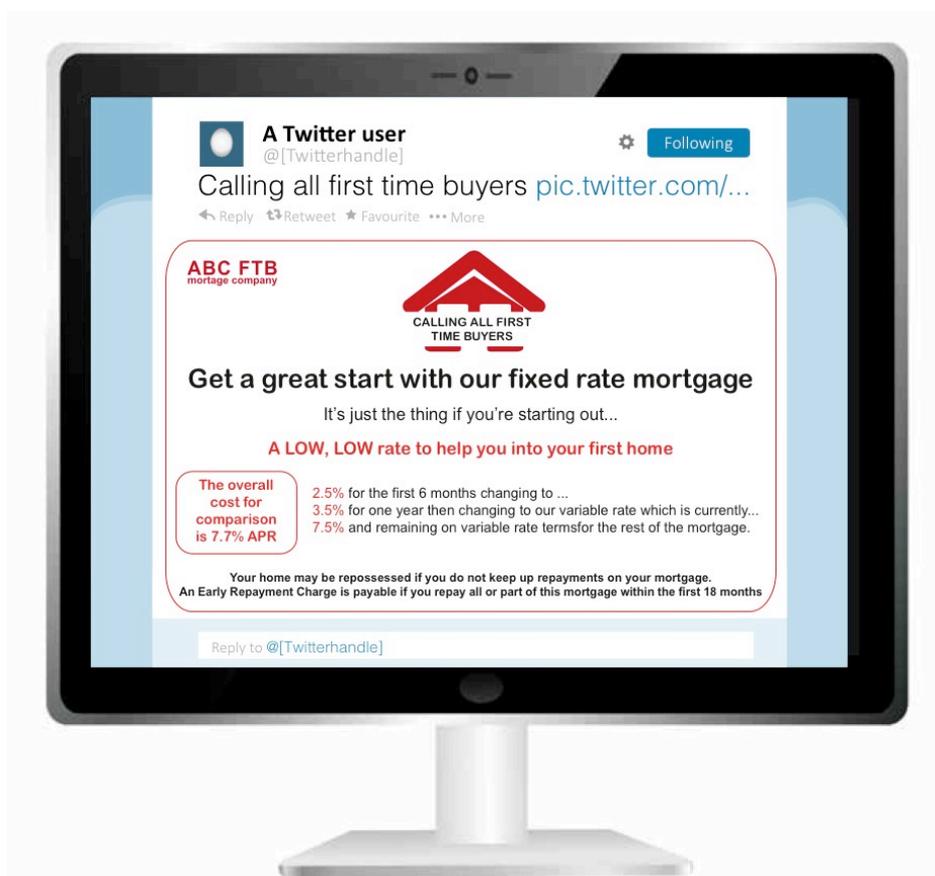


Risk warnings and other required statements

- 2.12 We remind firms that there are requirements to include risk warnings or other statements in promotions for certain products/services. These rules are media-neutral and therefore apply to social media as they would to any other medium. When taken into account with our supervisory approach to standalone compliance, this poses particular challenges for the use of character-limited social media.

- 2.13 We recently introduced a risk warning for promotions of high-cost short-term credit. This rule requires a short statement to be included unless, because of limited space in the medium used, this is not reasonably practicable.⁷
- 2.14 One possible solution to the problem of character limitation is to insert images, including the use of infographics⁸, into communications such as tweets (see figure 5), which allows relatively unrestricted information to be conveyed. Clearly, the image must in itself be compliant.

Figure 5: Inserted images example



However, we are aware that the functionality that allows a Twitter image to be permanently visible, may be switched off so that the image appears simply as a link.⁹ Therefore, where the financial promotion triggers a risk warning or other information required by our rules, this cannot appear solely in the image.

⁷ CONC 3.4.1R

⁸ Graphic visual representations of [information](#), [data](#) or [knowledge](#) intended to present complex information quickly and clearly

⁹ Recipients with mobile devices may do this to save battery or speed up processing time. In addition, social media management applications such as Hootsuite and Tweetdeck may not show the image preview.

Firms can also tweet a link to a website with a financial promotion. We appreciate that firms will want to include some signposting language to encourage or give some reason to the recipient to open the link. We remind firms that the signpost must be standalone compliant. For example, with mortgages, character-limitation imposes constraints if the content would otherwise trigger the risk warning. Examples A. and B. below show compliant and non-compliant versions:

A. "To see our current mortgage offers, go to www.wharfmortgages.co.uk "

This is compliant as the signposting wording does not create a financial promotion: it simply encourages the recipient to find out more. Firms may want to review our existing guidance on what is an 'invitation or inducement' to engage in financial activity, in chapter 8 of the Perimeter Guidance manual:

<https://fshandbook.info/FS/html/FCA/PERG/8/4>

B. "To see our great mortgage offers, go to www.wharfmortgages.co.uk "

This is non-compliant as the element of inducement with the word 'great' creates a promotion that then requires a risk warning.

- 2.15 We say at paragraph 2.9 above that firms should consider the appropriateness of character-limited media as a means of promoting complex features of financial products or services. More broadly, we would highlight the fact that all media have their constraints: for example, radio adverts are audio-only, and television advertising, outdoor advertising (billboards etc.), digital and print advertising all have different characteristics. Advertisers in all sectors, not just financial services, have to work within the constraints of the medium chosen.

Image advertising

- 2.16 We remind firms that it remains possible to advertise their presence in the market through 'image advertising' in a way which is less likely to present difficulties with character limits. This shares some features with 'brand' advertising but there are specific requirements in our Handbook. 'Image advertising' (or its equivalent in the different sourcebooks) is defined in the FCA Handbook 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.¹⁰ Below is a summary of how image advertising interacts with the conduct of business rules for different sectors:

- For investments, image advertising is exempt from most of the detailed financial promotions rules and guidance in COBS 4, but it will still need to comply with the high-level 'fair, clear and not misleading' rule.

¹⁰ <http://fshandbook.info/FS/glossary-html/handbook/Glossary/I?definition=G2470> and see also COBS 4.5.1R (2)(b), MCOB 3.2.5R (2) and CONC 3.1.7R

- For mortgages, MCOB 3 contains a specific exemption for financial promotions that comply with MCOB 3.2.5R.
- For insurance and banking, there is no equivalent provision for image advertising in ICOBS 2 or BCOBS 2 and firms cannot rely on exemptions.
- For credit products, CONC 3 applies only to a limited extent to financial promotions or communications falling within CONC 3.1.7R and that comply with the parts of CONC 3 set out in that rule.

Figure 6 shows an Instagram image advert (compliant) and figure 7 shows a similar-format advert that goes beyond 'image' with the words 'come and spreadbet with us' and is non-compliant (as it does not give a fair and prominent indication of the relevant risks).

Figure 6: Compliant

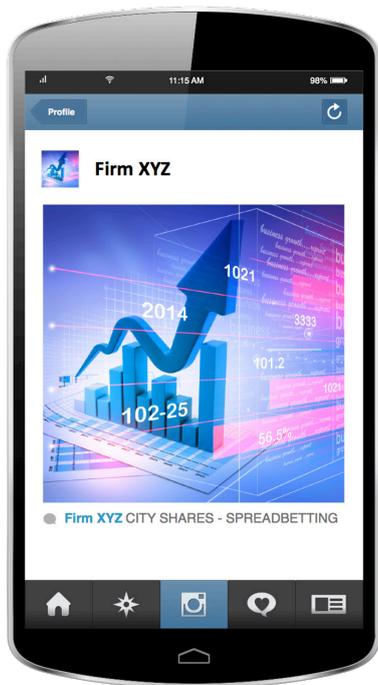


Figure 7: Non-compliant



Other regulatory issues

Recipients sharing or forwarding communications

- 2.17 Where a recipient shares or forwards (such as by re-tweeting) a firm's communication, responsibility lies with the communicator, so in that case the firm would not be responsible. We remind firms, however, that any breaches of our rules in the original communication are still the responsibility of the originating firm, and not the 're-tweeter'. And where a firm re-tweets a customer's tweet (for example, one expressing satisfaction with the service received from the firm), the firm is responsible as the communicator, even though the firm did not generate the content of the communication.¹¹

International communications

- 2.18 Clearly, digital communications of all types, but including social media, are not limited by national borders. There are also of course a number of measures in place within the European Economic Area (EEA) to facilitate trade and commerce within the EEA. As the UK regulator, our rules cover all financial promotions capable of having an effect in the UK, unless an exemption is available.

'Real time' and digital media

- 2.19 Whether a financial promotion is considered real time or non-real time has implications for the rules that are potentially engaged, where the promotion is unsolicited (see paragraphs 2.20 and 2.21 below). Digital media communications take place in real time in the ordinary sense of that phrase, but may not fall within the definition of 'real-time' communication under article 7 of the Financial Promotion Order (FPO).¹²
- 2.20 We remind firms that a promotion is non-real time and therefore subject to our conduct of business rules where it creates a record of the communication, is directed at multiple recipients, and does not require the recipient to respond immediately. We would, for example, consider a tweet a non-real time promotion.

Unsolicited promotions

- 2.21 We remind firms that are considering sending marketing through electronic media that there are specific legal requirements that they must comply with when doing so.¹³

¹¹ Firms may wish to review our existing guidance on communicating, and its relevance to financial promotions at section 8.6 of our Perimeter Guidance Manual (PERG 8.6): <https://fshandbook.info/FS/html/FCA/PERG/8/6>

¹² Financial Services and Markets Act 2000 (Financial Promotion) Order 2005

¹³ Regulation 22 of the Privacy & Electronic Communications Regulations 2003 (PECR). With regard to unsolicited telephone calls for direct marketing purposes, live (as opposed to automated) direct marketing calls are covered by regulation 21 of PECR. The Information Commissioner's Office website provides more information through its [Direct Marketing guidance](#).

2.22 Social media are prime channels for making unsolicited promotions. For such promotions and 'cold calling' (unsolicited real-time promotions), we remind firms of our rules at COBS 4.8 (Cold calls and other promotions that are not in writing), MCOB 3.7 (Unsolicited real time financial promotions of qualifying credit, a home reversion plan or a regulated sale and rent back agreement) and CONC 3.10 (Financial promotions not in writing). As explained in the previous paragraph, a promotion by a tweet (for example) is not a real-time promotion within the meaning set out in the FPO. Firms may wish, however, to follow up promotions in social media with real-time promotions. In this context, however, our view is that being a 'follower' of the firm on Twitter or 'liking' a firm's Facebook page does not in itself constitute 'an established existing client relationship' for the purposes of COBS 4.8.2R (1) or an 'express request' for the purposes of MCOB 3.7.1R (2) (b).

Approval and record-keeping

2.23 We remind firms of their obligations to have an adequate system in place to sign off digital media communications. This sign-off should be by a person of appropriate competence and seniority within the organisation.¹⁴

2.24 Firms should also keep adequate records of any significant communications. As well as helping to protect consumers, these records enable the firm to deal effectively with any subsequent claims or complaints. Firms should not rely on digital media channels to maintain records, as they will not have control over this: social media in particular may refresh content from time to time, with the consequent deletion of older material.¹⁵

Advertising Standards Authority

2.25 Advertisers are required to adhere to the Committee of Advertising Practice Code, which applies to 'non-technical' elements of financial advertising, for example matters of social responsibility, harm and offence.

¹⁴ SYSC 3 and 4 generally, but particularly SYSC 3.1.6R, 3.2.6R, 4.1.1R and 4.3.1R; see also COBS 4.10, MCOB 3.9 and 3.11, and ICOBS 2.2.3R

¹⁵ COBS 4.11; MCOB 3.10; ICOBS 2.4

3 Next steps

Consumer research

- 3.1 We plan to commission exploratory, qualitative research to gain a better understanding of how consumers receive, use and contextualise financial promotions that may come to them through social media communications. We will also continue to consult widely with both industry and consumer groups.

Cost benefit analysis

- 3.2 In this case, we believe the proposed guidance would not lead to an increase in costs, or if there were any increase, this would be of minimal significance. We do not therefore propose to carry out a cost benefit analysis.

Consultation

- 3.3 We welcome comments on the statement of our supervisory approach set out in chapter 2 of this Guidance Consultation. We welcome any comments also on the question of costs (see 3.2 above).

- 3.4 You can send your comments by email to: Richard.Lawes@fca.org.uk or by post to:

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The Financial Conduct Authority
25 The North Colonnade
London E14 5HS

- 3.5 Please respond by 6 November 2014.